Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

1996 Term

RICHARD DELK and HAROLD RAMSEY,
on behalf of themselves and as representatives
of the class herein defined,

Petitioners

vs.

FORD MOTOR COMPANY; FORD-UAW
SUPPLEMENT UNEMPLOYMENT
BENEFIT PLAN; INTERNATIONAL UNION,
UNITED AUTOMOBILE, AGRICULTURAL IMPLEMENT
and AEROSPACE WORKERS OF AMERICA-UAW,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a defined trustee under an ERISA governed plan may rely upon actions performed by non-fiduciaries in order to sustain the fiduciary standard of care.

II. Whether a corporate fiduciary may rely upon its ignorance of its own conduct in demonstrating its proper discharge of its fiduciary duty.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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APPENDIX

Appendix A — Findings of Fact and Conclusions of Law and Judgment of the United States District Court for the Western District of Kentucky, dated June 30, 1994.

Appendix B — Opinion of United States Court of Appeals for the Sixth Circuit.

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Richard Delk and Harold Ramsey, on behalf of themselves and as representatives of the class herein defined, by counsel, pursuant to U. S. Supreme Court Rule 21, respectfully set forth below their Petition for Writ of Certiorari.

OPINIONS BELOW

Appeal is taken from the decision of the United States Circuit Court, Sixth Circuit: *Richard Delk and Harold Ramsey, on behalf of themselves and as representatives of the class herein defined v. Ford Motor Company; Ford-UAW Supplemental Unemployment Benefit Plan; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America-UAW, Case No. 94-6259,* Opinion filed September 16, 1996.

The Opinion appealed to the Circuit Court was the Opinion issued by the United States District Court for the Western District of Kentucky at Louisville, *Richard Delk, et al. v. Ford Motor Company, et al.,* Civil Action No. C-82-0208-L(M), entered August 26, 1994.

STATEMENT OF JURISDICTION

Petitioners appeal from the decision of the United States Circuit Court for the Sixth Circuit entered on September 16, 1996, affirming the decision rendered by the United States District Court for the Western District of Kentucky, as identified above, entered August 26, 1994.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

APPLICABLE CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

1. Employee Retirement Income Security Act, 29 U.S.C. §1132

2. Trade Act of 1962, 19 U.S.C. §§2271, et seq.

STATEMENT OF THE CASE

The petitioning class is comprised of persons who were employed at Ford Motor Company's ("Ford") Kentucky truck plant in Louisville, Kentucky, and who had less than ten years of seniority in 1980. Each of the members of the petitioning class are also members of Local 862 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"). At all material times, the petitioners were beneficiaries of the Ford-UAW Supplemental Unemployment Benefit Plan ("SUB Plan"), and each was denied benefits under the Plan when they were laid off in 1980. All of the class members were eligible to receive benefits, but either received significantly reduced benefits or no benefits whatsoever because there were no funds available to pay benefits from the Plan.

Ford and the UAW established the SUB Plan in 1955 to provide laid off Ford hourly employees and union members with benefits which would supplement but not duplicate their

state and federal unemployment benefits. At that time, the Plan was commonly referred to as the "guaranteed wage", and meant that hourly employees could build their lives with far less concern of financial ruin in the event of layoffs. Accordingly, when the Plan was amended on October 4, 1979, a Ford employee could receive a combination of governmental unemployment benefits and SUB benefits equal to 95% of his or her average weekly wage, less $12.50. Under the express terms of the SUB Plan, Ford was the named fiduciary, and the Plan was administered by the Joint Board of Administration of Ford Motor Company-UAW. In reality, however, a single department within Ford -- the Department of Hourly Benefits -- administered the SUB Plan. These individuals had no involvement in planning production, determining whether to make layoffs, or any other activity which would cause workers to become eligible to receive benefits.

Beginning in 1978, Ford commenced a period of layoffs unprecedented and unequaled in its history. This period of layoffs continued through 1980, and involved tens of thousands of workers in virtually every Ford plant across the United States. As these workers were laid off, they began to receive SUB Plan benefits. In addition, because they were not working, the primary source of funding of the SUB Plan was eroding. The SUB Plan, by its terms, is funded by a contribution determined from the number of hours worked. Thus, as fewer employees worked fewer hours, the contributions to the SUB Plan were significantly reduced while, at the same time, the demand for the payment of benefits was continually increasing. The individuals who administered the Plan in the Office of Hourly Benefits received only a skeletal production schedule to suggest to them how they could forecast the demand for benefits and the amount of contributions to be made.

From these production forecasts, which consisted of no more than two or three pages of information, the individuals in the Department of Hourly Benefits sat secure in their belief that the Fund would not run dry until late February, 1980. At that time, these individuals received a forecast which suggested to them that the fund would be exhausted by August 1980. In response, they fairly promptly contacted their counterparts with the UAW, and suggested that the parties modify a term of the SUB Plan which allowed SUB benefits to be offset by other governmental benefits "received or receivable".

This ultimately became a letter agreement dated April 8, 1980, known as the "Ryder-Bannon Agreement". Essentially, the agreement redefined the term receivable so that SUB benefits could be curtailed slightly sooner than before. It had no positive impact on petitioners.

As will be discussed in more detail, the state benefit in question were those afforded under the Trade Readjustment Allowance ("TRA"), authorized by the Trade Act of 1962, 19 U.S.C. §§2271 et seq. These federal benefits were paid to workers laid off due to foreign competition, and had been utilized by the Big Three automakers on at least three prior occasions. By April 1980 however, even assuming that TRA benefits were available, TRA benefits could not be paid in time to stave off the depletion of the subfund.

One major problem compounding the delay in receiving TRA benefits was the fact that the UAW had not applied for them on behalf of Ford workers until January 1980. However, Chrysler workers had begun receiving TRA benefits in late 1979 because the UAW first chose to apply only on behalf of Chrysler workers. Long after the fact, this became known as the "Chrysler Strategy", and became the focal point of Ford's contention that it had appropriately discharged its fiduciary duty in administering the Ford SUB fund, even though the

individuals who worked with the Ford SUB fund had little contemporaneous knowledge that the Chrysler Strategy was being pursued. The other fact that Ford relied upon in arguing that it had appropriately discharged its fiduciary duty was that the employees in the Hourly Benefits Department could not have forecasted the tremendous extent of layoffs that occurred in 1980. That may be true, but Ford Motor Company was the fiduciary, and Ford Motor Company was the sole party to determine when and who would be laid off. Amazingly, the District Court accepted these arguments, essentially allowing an ERISA fiduciary to unwittingly delegate its obligation to seek alternative funding to another party, and to allow a corporate fiduciary who is both employer and fund administrator to compartmentalize its activities to the detriment of beneficiaries. Neither course of conduct should be permissible under the law.

REASONS FOR GRANTING THE WRIT

As this Court underscored in *Firestone Tire and Rubber Company v. Bruch*, 489 U.S., 101 (1989), the fiduciary standards of ERISA are derived from the common law of trusts, with special recognition of the unique purposes and characteristics of employee benefit plans. This court also recognized in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983), that ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans." Further, it is the obligation of the fiduciary to protect contractually defined benefits. *Firestone Tire and Rubber Company v. Bruch*, *supra*. This case presents the unique situation where the fiduciary's conduct determines not only the amount that will be paid out of the fund, but the amount which will be contributed to the fund. When Ford Motor Company made the decision to lay off workers, the cause and effect was to raise the demand for benefits while concomitantly reducing the level of funding. It was Ford's obligation to preserve fund

assets for the benefit of the employees who had the contractual, bargained for right, and for which Congress enacted ERISA to protect them.

et Ford Motor Company delegated the entire role and responsibility for seeking the offsetting state benefits afforded by TRA to the UAW. The UAW, in turn, intentionally delayed seeking benefits for its Ford-employed members so that it could pursue benefits on behalf of its Chrysler-employed members. Although Ford and the UAW, and the courts below, refer to this as the "Chrysler Strategy", Ford and the UAW did not produce one document created during the time when the so-called "Chrysler Strategy" was supposedly being pursued that either referred to it as the Chrysler Strategy, or which laid out something which could be liberally construed as a strategic plan. In short, the evidence demonstrated that the Chrysler Strategy was not created until late in 1980, when the Delk plaintiffs came to the window to find that their SUB Plan was exhausted, and they were not entitled to TRA benefits. Their pill was perhaps more bitter to swallow because at the Louisville Assembly Plant across town, where the workers had received their TRA benefits in full and had also received their full sub-benefits, Ford was now faced with the conundrum of trying to collect back millions of dollars of overpayments. These overpayments not only occurred at the Louisville Assembly Plant, but at virtually every Ford manufacturing facility save the Kentucky truck plant and one or two other locations. Sixteen years later, millions of dollars remain uncollected.

Supplemental unemployment benefit plans are unique under ERISA. The protection afforded by the plans is triggered when the employer decides to lay off workers. The employer is also funding these plans through a contribution based upon the hours worked by an employee, and the employer is also the named fiduciary of the plan. Moreover, SUB Plans are in place

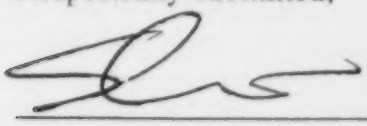
at Chrysler, Ford and General Motors, and at many other large employers in the aerospace and appliance industries. Hundreds of thousands of employees rely on the availability of these benefits, and pay for these benefits every day they work.

The traditional standards of care applied under ERISA, whether it be a prudence standard or an arbitrary and capricious standard, affectively afford these workers no real protection. In the case of Ford, the individuals who decided to make layoffs had no knowledge of whether supplemental unemployment benefits were available, or what impact those layoffs would have on funding levels. Conversely, the individuals who managed the SUB fund assets had no voice in making layoffs, and received very minimal information with respect to them, and then only immediately before the layoff occurred. In fact, the employee of Ford in absolute charge of the subfund management testified in the trial of this case that he received his information about layoffs like the rest of us -- from the newspaper.

Under no circumstances can this conduct rise to the level of the discharge of a fiduciary's duty. A corporate employer cannot be permitted, as Ford was permitted, to literally rely upon a defense that because the left hand did not know what the right hand was doing, the corporation as a whole was not imprudent.

This Court has long looked to the origins of ERISA in the common law of trusts. SUB Plans do not particularly fall within that logic, because the employer is both the settlor of the trust and the trustee. Hence, the traditional concepts of duties to preserve fund assets are inadequate, and this Court should fashion a rule of law appropriate to this type of ERISA governed plan which is, although unique, of paramount importance to the fabric of the American economy.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

NO. C-82-0208-L(M)

RICHARD DELK, et al. PLAINTIFFS

V.

FORD MOTOR COMPANY, et al. DEFENDANTS

CONSOLIDATED WITH

CIVIL ACTION NO. C-82-0473-L(M)

JERRY ARTHUR, et al. PLAINTIFFS

V.

FORD MOTOR COMPANY, et al. DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These consolidated class actions are brought pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), Title 29 U.S.C. §§ 1132(a), 1132 (a)(1)(B) and 1132 (a)(3) and Section 301(a) of the Labor Management Relations Act of 1:947 (LMRA), Title 20 U.S.C. § 185(a), to enforce and clarify rights under a collective bargaining agreement (CBA) and for other relief. Plaintiffs claim that the defendant employer, Ford Motor Company (Ford), and the defendant, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW or the Union), violated the Ford-

UAW Supplemental' Unemployment Benef it Plan (SUB Plan), negotiated as part of a collective bargaining agreement. Plaintiffs also claim that Ford and the UAW breached fiduciary duties and denied benefits to plaintiffs in violation of ERISA. Other named defendants are alleged to have violated either the LMRA or ERISA by their conduct in their affliation with either Ford or the UAW. The case came to trial before the Court. Trial was concluded on October 21, 1993.

The following represents the Court's Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiffs are present and former hourly paid Ford employees who are or were members of the UAW. At times relevant to this action, class plaintiffs represented by Jerry Arthur were employed at Ford's Louisville Assembly Plant and class plaintiffs represented by Richard Delk were employed at Ford's Kentucky Truck Plant. (Plaintiffs are hereinafter referred to as the Arthur plaintiffs and the Delk plaintiffs) The Arthur plaintiffs allege that Ford violated the SUB Plan by 1) failing to notify them of alleged overpayments of SUB benefits in a timely manner and 2) deducting the amount of the alleged overpayments from wages paid to then after they were recalled from layoff in 1979 and 1980. The A-rthur plaintiffs also allege that Ford violated ERISA by its failure to deliver copies of a Summary Plan Description regarding the SUB Plan to each plaintiff. The Delk plaintiffs allege that either or both the Union and Ford did not pay then a benef it to which they were entitled under the SUB Plan when they were laid off during 1980.

2. The defendants are parties to the collective bargaining agreement (CBA) under which the SUB Plan was established Exh.

The SUB Plan creates a Fund from which eligible laid-off employees may collect benefits which, when supplemented by state unemployment compensation and other state and federal benefits, amounts to a maximum payment of 95% of a covered worker's normal take-home pay, less $12.50.[1] Id.; Article II § l(a). SUB Plans are "pattern" benefit plans, designed to offer eligible workers supplemental income for up to a year during temporary downturns in production. Tr.Vol. 14-61.[2]

3. The SUB Fund is funded primarily by contributions from Ford and the level of contribution is set forth in the Plan. Under the Plan terms, Ford contributes a fixed number of cents per hour for each hour worked by an employee. The amount of contribution depends on the level of the Fund.[3] Exh. 11; Art. VII, § 5.

4. The terms of the SUB Plan required Ford to increase the amount of its regular contributions as the Fund balance decreased in order to maintain sufficient funding to pay out benefits at least to employees with ten or more years of seniority. Id.; Art. III §§ 2 and 5.

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[1] The Plan states that the SUB benefit must be added to "State benefit and other compensation" "received or receivable." Tr.Vol. 2-64.

[2]2 The SUB Plan allows Ford to maintain an experienced work force after periods' of layoff and the UAW retains workers' membership. Tr.Vol. 14-61.

[3]The Plan receives income from interest earned on assets and the recoupment of overpayments to hourly employees. Tr.Vol. 16-92.

5. In order to be eligible to receive SUB benefits, employees accumulate credit units based upon actual weeks worked and seniority, up to a maximum of 52 credit units. Id. Art. III § 2. Laid-off employees surrender credit units for a weekly SUB benefit. Id. Art. I § 1; Art. III, § 4. Depending upon the level of funding in the Plan, the number of credit units surrendered to receive a weekly benefit may increase or decrease. The less money in the SUB Fund, the more credit units that must be exchanged for the weekly benefit. Id. ; Art. III, § 3.[4] Less senior employees surrender more credit units than more senior employees. Tr.Vol. 3-15; Id.; Art. III, § 4.

6. The SUB Plan expressly states, 11[nlo person shall have any right, title or interest in or to any of the assets of the Fund .... 11 Id.;Art. VII, § 7. However, to the extent that funds are available, an eligible laid off employee is entitled to receive and Ford is obligated to pay SUB benefits. Id.; Art. I, § 1; Art. II, §§ 1, 4, 6; Art. VII, § 4. A Joint Board of Administration, composed of three representatives from Ford and three representatives from the Union, administers the SUB Plan. Ford is the named fiduciary and Ford is the named Plan Administrator.

7. Richard Delk testified that he began working in the Kentucky Truck Plant in 1973. Tr.Vol. 2-13. Mr. Delk first received SUB benefits in 1974. Tr.Vol. 2-14.

8. The provisions of the SUB Plan are condensed in a Summary Plan Description (SPD) for the benefit of Ford employees. Exh. 12. The SPD does not contain information about overpayments or Ford's right to recoup SUB overpayments.

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[4]When an eligible worker received a check for his or her SUB benefit, the check indicated the number of credits cancelled. Tr.Vol. 2-105.

Mr. Rose, an A-rthur plaintiff, testified at trial that he never received an SPD. He also testified that he didn't know whether or not he had a copy of the SUB Plan in his possession when he was laid off or when he received a notice of overpayment. He did obtain a copy of the SUB Plan from Ford after he received a notice of overpayment. Tr.Vol. 10-37 to 45. Ms. Wright, an Arthur plaintiff, testified that she never received an SPD. Tr.Vol. 12-66. Mr. Delk testified that he received a copy of the SPD. Tr.Vol. 2-95. Harold Ramsey, A Delk plaintiff, testified that he couldn't remember whether or not he received an SPD. Tr.Vol. 3-61. Both Delk and Ramsey testified that employees of the Truck Plant received a booklet shortly after each negotiation of the collective bargaining agreement and the booklet contained a copy of the SUB Plan. Tr.Vol. 3-30. 9. Beginning in 1979 and throughout 1980, thousands of Ford employees, including the class plaintiffs herein, were laid off because of a downturn in automobile and truck sales in the United States.[5] See Hourly Employment Status Reports, Exhibits 91, 102, 104, 110, 112, 120, 122, 125, 134, 139, 143, 146. At least one Arthur class member, Patricia Wright, was never recalled from layoff. Eligible plaintiffs collected state unemployment benefits, submitted proof of the unemployment benefit to Ford on a weekly basis, and then Ford paid out an appropriate amount from the SUB Fund to each plaintiff. Ken Bannon testified that during this time, no one was able to determine how long the layoffs would last. Bannon depo. at 53.

10. On June 30, 1980, the SUB Fund dropped to a level at which only employees with ten or more years of service received SUB payments. A large number of hourly workers at the Kentucky Truck Plant, including most members of the Delk class, were laid off on July 25, 1980. From that date through

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[5]5Thousands of hourly workers at the Ford Louisville Assembly Plant were onindefinite layoff status in January, 1979.

November 16, 1980, laid off Kentucky Truck Plant workers with less than ten years' service received no SUB payments due to the low level of the SUB Fund. (The Plan documents provided for a guaranteed benefit to employees with ten or more years of seniority under certain conditions. Tr.Vol. 2-68. The Fund had never before reached such a low level. Becker depo. at 47; Tr.Vol. 16-165; Exh. 424.

11. From November 16, 1980 until December 29, 1980, workers with less than ten years service received slightly reduced SUB payments. Full SUB payments were resumed to all eligible employees on December 29, 1980 Throughout 1980, Ford contributed the maximum hourly contribution rate required by the terms of the SUB Plan. Tr.Vol. 16-133. ii. The Delk plaintiffs were prohibited from or restricted in trading credit units for benefits during the five month period from July to December, thereafter they were able to use their credit units to receive benefits as provided under the Plan. Tr.Vol. 2-76, 105; Tr.Vol. 3-31, 35.

12. In response to requests for SUB applications from July through November, 1980, Ford notified employees that no employee with less than ten years service would receive SUB because the Fund was unable to pay. Tr.Vol. 2-50, 104. The SUB Plan outlines' specific procedures for appealing a denial of benefits. Art. V, § 3. That provision states that a worker may first appeal to the Ford-UAW Local Committee. Further appeal is available to the Board of Administration. Appeals at each stage must be in writing, setting forth the sections of the Plan allegedly violated and the facts justifying reversal of denial determinations. The Plan expressly provides that appeals decisions are final and binding on the Union, the employee, the Trustee and the Company. Art. V, § 3(b)(2)(vi).

13. The Delk plaintiffs did not attempt to challenge internally the denial of benefits before filing suit in federal court. Tr.Vol.

2-48 to 50, 80, 112; Tr.Vol. 3-26, 27. The Arthur plaintiffs' appeals, based on disputes over their duty to repay alleged overpayments from the SUB Fund, were filed late, because of Ford's inability to provide appeals forms in a timely manner. Tr.Vol. 11-6, 10. However, the appeals were processed and heard without regard to the delay. Exh. 258; Tr.Vol. 11-96,97.

14. Under the terms of the SUB Plan, a worker could not receive SUB benefits to the extent that he or she was receiving other state benefits, including trade readjustment benefits. Art. IX, § 29; Exh. 11. Trade Readjustment Allowance (TRA) is a federally funded unemployment benefit authorized by the Trade Act of 1974, paid to workers who are separated from their jobs as a result of foreign competition. Title 19 U.S.C. §§ 2271 et. seq. Under the terms of the SUB Plan, Ford may consider TRA benefits "received or receivable" by an employee in determining the amount of SUB benefits to which the employee is entitled.

15. To be awarded such federal benefits, a. group of three employees or their authorized representative must petition the United States Department of Labor (DOL) for certification. Title 19 U.S.C. § 2271; Fooks depo. at 10; Page depo at 22 and 23. DOL then determines, on a plant by plant basis, whether layoffs have resulted from "increases of imports of articles like or directly competitive with" the product produced by the plant. Title 19 U.S.C. § 2272. The increase in imports must have "contributed importantly to" layoffs and declines in production or sales. Title 19 U.S.C. § 2272. When a plant is certified, the state unemployment agency receives applications from individual employees, processes the applications and pays claims for TRA benefits to those employees who are found eligible. Id. at § 2311. 16. Even when DOL certifies a plant for TRA benefits, not every employee in the certified plant may be eligible for benefits. Tr.Vol. 15-82 to 85. DOL's certification may apply to only certain products manufactured in the plant. Employees who work on noncertified

products are not eligible to receive TRA benefits. Eligible employees must have worked on a certified product for 26 weeks of the 52 weeks prior to lay-off and must have been paid at a. certain wage level for those 26 weeks. Leonard Page, Associate General Counsel for the UAW, testified that 10% to 20% of workers at a certified plan would not be found eligible for TPA benefits. Id.; Tr.Vol. 14-86, 87, 15-50. Page testified that the biggest problem at certified plants was the 26-week requirement,

> because the [DOL] took the view that the phrase 'wages' in the statute meant take home pay. So they did. not count sick leave pay, vacation pay, holiday pay. The net effect of that is if a worker had had a. workers comp leave or sick leave or medical leave or personal leave in the year preceding the certif ication then the Secretary did not count those weeks.

Tr.Vol. 14-85, 86.

17. Under the terms of the SUB Plan, Ford considered TRA "received or receivable" by an employee in determining the amount of SUB to which the employee was entitled.

18. In late 1979 and 1980, Chrysler Corporation (Chrysler), General Motors (GM), and Ford (the "Big Three" American automakers) were experiencing massive layoffs. In the summer of 1979, Leonard Page and other UAW employees considered a plan to obtain TRA benefits for UAW members nationwide. Page depo. at 88; Tr.Vol. 14-31, 62 to 64; 16-5.[6] Page had been

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[6]The UAW traditionally filed petitions for FRA on behalf of its members as their authorized representative. Tr.Vol. 15-5, 6; 16-5, 6, 44 to 46; 17-78, 80, 92; Ryder depo. at 56. Victor Zink, who worked for GM in the administration and negotiation of its SUB Plan from 1953

involved in almost every petition filed in the UAW's name under the Trade Act of 1974. Tr.Vol. 14-9.[7] The UAW had a low success rate with certifications prior to 1979 because DOL reviewed petitions with what Page termed a "market segment approach." Tr.Vol. 14-23, 48; Page depo. at 26-27, 42-46, 48. Page testified as follows:

> Well, they chose to define, and we can understand why because the industry itself defines the categories this way. They break the auto and truck market into segments, we had subcompacts, compacts, mid size cars, full size cars, luxury cars, sport cars, trucks, vans, and maybe even one or two other segments there, and as a rule in the early days of filing these petitions the [DOL) would define the competitive focus as narrowly confined within these segments.

Id.

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until he retired in 1991, testified:

> Well, in our experience the UAW always filed for its people. We thought, we went along with that because we thought they were more likely to succeed than we were. They had a better experience with [DOL], they had more political clout in Washington in those times than we did. Moreover that made sense for them to do it rather than for us so people wouldn't think we were just trying to save money. Tr.Vol. 16-78, 79.

[7]See e.g., UAW v. Marshall, 584 F.2d 390 (D.C. Cir. 1978), after remand, 627 F.2d 559 (D.C. Cir. 1980).

19. In 1975 and 1977, the UAW litigated unsuccessfully the market segment approach in UAW v. Marshall, supra. at fn. 7. The litigation was prompted by DOL's failure to certify approximately 70% of the plants in the UAW's prior petitions on behalf of Ford and Chrysler and 90% of the plants in the UAW"s GM petitions. Tr.Vol. 14-23, 29, 30; Tr.Vol. 16-80. DOL's position was that imported subcompacts or small luxury cars did not compete with large cars manufactured by U.S. automakers. Tr.Vol. 14-49, 50; Tr.Vol. 16-80. By 1977, the UAW filed a petition only if a strong case could be made for certification under the market segment theory. Tr.Vol. 14-49.

20. Although the majority of the Big Three plants certified by DOL in,1975 and 1977 manufactured and assembled subcompact cars, a few of the certified plants primarily produced parts for subcompact cars. (Ten petitions were filed for Ford in 1977; four were granted and six were denied.) To obtain certification for all or a portion of a parts plant, the UAW had to show that some or all of the parts produced in a. certain plant were ultimately included in an assembled car manufactured by a certified plant. Tr-Vol. 14-28, 47, 48.

21. In late 1979, the UAW decided to present a petition to DOL for Chrysler alone, i.e., "the Chrysler Strategy." Page depo. at 88-90, 94, 95; Tr.Vol. 14-62 to 64. Chrysler, the smallest of the Big Three, had experienced the longest layoffs, its SUB Fund was virtually depleted and the company was in dire financial straits. Tr.Vol. 16-79. Page testified:

> Chrysler's problems were well documented in the public arena, I think this was the beginning of the congressional effort for the so-called Chrysler bail out or the Loan Guarantee Act. There was a lot of sympathy for trying to do something for, lets not forget at that time I think this was a company of better than a. hundred thousand employees, and there was a lot of public sympathy in

> Congress and elsewhere to find some way to keep this company afloat. We saw this as an opportunity, there were other things going on there too, there was the Arab oil embargo which was running the price of gasoline up quite high. And in response to that we saw, at least our researchers saw that people were shifting their market segments.

Tr.Vol. 14-62, 63; see Tr.Vol. 16-79.

The petition was directed toward parts manufacturers as well as assembly plants. Tr.Vol. 14-18, 19. If Chrysler's petition was granted, the UAW hoped to use that precedent to petition for Ford and GM. Id.; Tr.Vol. 14-64.

22. The Chrysler petition was filed on August 28, 1979 for all plants with significant unemployment. Exh. 412; Tr.Vol. 14-64. On May 22, 1979, the UAW filed a petition for workers producing vans and wagons at Chrysler's Fenton, Missouri, Truck Assembly Plant. DOL denied the Fenton petition on August 2, 1979, finding unemployment at the Fenton plant due to factors other than foreign competition. Tr.Vol. 14-6. DOL denied the UAW's application for reconsideration. Exh. 413, 426.

23. On October 4, 1979, Page sent a memorandum to UAW-representatives at Ford, GM and International Harvester in which he asked for support of Chryler's remaining petition. Page advised Ford that if the -UAW was successful in obtaining TRA benefits for Chrysler workers, it would file petitions for Ford and GM. Tr.Vol. 16-17.[8] Page also requested that the

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[8]Page testified that the federal TRA unemployment benefit in 1979 equalled 70% of the average weekly wage, not to exceed the national average wage and averaged about $289.00 per week. The federal benefit replaced not only SUB benefits but state unemployment benefits. "[Employers]

Big Three automakers share classified marketing data to challenge DOL's market segment approach.[9] Exh. 414; Tr.Vol. 14-67; Tr-Vol. 16-15 to 17, 32, 188.

24. On November 6, 1979, DOL certified all of the plants in the Chrysler petition. Exh. 425, 426; Tr.Vol. 14-65. Page and the research staff at UAW began to collect information on a plant by plant basis to file petitions for Ford and GM. Tr.Vol. 14-74; 1620, 21. Ford provided Page with all the data he requested to complete Fordfs petition. Tr.Vol. 15-21, 22. Page testified that the work of putting together petitions for certification of parts plants was the most time consuming,

> ... I can recall what goes into those petitions. We had to identify the name of the plant, it's (sic) location,. the products it assembled. at that plant, the normal employment level, the current employment level and generally the petition asked for some statement or some connection as to why we thought imports were a factor causing unemployment at that location.

Tr.Vol. 16-10. In parts plants' petitions, Page had to identify hundreds of parts and the models the parts went into. Tr.Vol. 16-9.

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are charged a certain amount each year by the government based upon their prior years' employment experience. So even though most people view state UI as a benefit coming from the various states, employers contribute the vast majority of state UI's.'" Tr.Vol. 14-71.

[9]Ford did not furnish all of this information to Page, but instead met with DOL and supported the Chrysler strategy. Tr.Vol. 15-84; 16-16.

25. The first drafts of the petitions were completed by the first week of January, 1980, but filing was delayed due to amendments necessitated by increasing layoffs. Tr.Vol. 14-77, 78; 15-92. Page testified that his experience with the DOL and with the office of Trade Adjustment Assistance indicated that the DOL would not accept a petition prior to actual layoffs. Tr.Vol. 15-4. When Page called Marvin Fooks, Director of the Office of Trade Readjustment Assistance, at DOL to notify him that petitions would be filed, Fooks requested Page to provide data on certification of parts plants in the petitions. Fooks specifically instructed Page to file comprehensive petitions and not to "piece-meal" him. Tr.Vol. 15-89, 90; Tr.Vol. 16-135, 137.

26. On January 30, 1980, the UAW petitioned the DOL for TRA certification of approximately 56 Ford plants, including the Louisville Assembly Plant.[10] Patterson depo. at 13; Fooks depo. at 45-46, Exh. 15-17, 48, 426.

27. Ford was obligated, under the terms of the -SUB Plan, to makebenefit payments to all eligible laid-off workers as long as the SUB Fund contained assets. Exh. 11; Art. I, § 1; Art. II, §§ 1, 4, 6; Art. XIII § 4. However, the Plan also permitted Ford to offset the amounts of TRA "received or receivable" for a given week of layoff from SUB paid or payable for that same week. Exh. 11; Art. II, §§ 1 and 3- Once TRA was "received or receivable," payments out of the SUB Fund would be reduced. The Trade Act contained no deadline or statute of limitations for TRA applications (or any requirement that an application ever be made).

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[10]Ford petitioned the DOL in Decei-nber, 1980 with respect to the Kentucky Truck Plan. Exh. 170.

28. On April 8, 1980, Ford and the Union reached an agreement which interpreted the term, "receivable." Exh. 76 (the Ryder-Bannon Agreement). The Ryder-Bannon agreement provided in pertinent part:

> While eligible employes should apply for TRA, it is in the best interests of all employes that the future of the SUB Fund not be jeopardized by the failure or delay of employees to apply for these benefits. Therefore, consistent with the provisions of the SUB Plan, it is agreed to take the following action under the current circumstances. When employes have been certified as eligible for TRA, the Company will do everything possible to provide the state agency involved with payroll data required to facilitate processing of claims and payment of TRA benefits and otherwise to cooperate with the state agency. Based on a reasonable time for filing applications and the tine the state agency requires to process claims, a date will be established by the SUB Board of Administration for taking account of TRA which employes at each location are eligible to receive in the calculation or recalculation of SUB benefits. The SUB Board of Administration shall closely monitor the performance of the state agencies with the objective of avoiding any interruption in TRA benefits to the extent possible. Upon the d.ate(s) established by the SUB Board of Administration, SUB will be reduced for all employes at each certified location eligible for TR-A.

The Agreement allowed the Fund to deduct TRA from SUB payments to eligible laid off employees once the state agency was able to process and pay promptly any TPA claims,

regardless of whether the worker had actually made a claim for TRA.[11]

29. On April 17, 1980 and April 25, 1980, DOL certified that employees at the Louisville Assembly Plant and various other Ford plants were eligible to apply for TRA benefits. Ryder depo. at 53; Exh. 196, 424, 425, 426; Title 19 U.S.C. § 2272. Class plaintiffs who were laid off from the Kentucky Truck Plant never received TRA benefits. Tr.Vol. 2-9730. The DOL determined that eligible Louisville Assembly Plant employees could apply for retroactive TRA benefits for weeks of layoff beginning on or after January 30, 1979.[12] The workers had already received, state unemployment benefits and. full SUB benefits for those weeks. Fooks depo. at 34, 35. Therefore, when those employees eligible for TRA benefits applied for and subsequently received such benefits, their take home pay for the weeks in which they were laid off exceeded

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[11]Zink testified that GM's SUB Plan provision permitted GM to offset TRA from SUB benefits when TRA was received or receivable and that GM interpreted the term "received or receivable" to mean when there was a reasonable likelihood that those benefits would be payable to our employees. And that reasonable likelihood was when the states were up and operating and either paying or getting ready to pay the benefits." Zink continued, ...[T]he states did not anticipate all of these mass approvals either, and they were not set up, they were not geared up to pay the benef its in a short amount of time. It took weeks, even months, in some instances, before these benefits were payable .... Tr.Vol. 16-84.

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95% of their regular take home pay, less $12.50.[13] Mr. Rose acknowledged that he received approximately double what he would have earned if he had' been working. Tr.Vol. 10-74. Rose testified, "probably every employee...realized that they were receiving more than what they should." He continued,

> [W]e were told to file for the TRA. There was a trade allowance that we were entitled to. This - in my opinion, the Board that was governing this petitioned for us a TRA for the purposes of recovering their SUB Fund money from us is why they petitioned to begin with. But like I say, it was no fault, in my opinion, of Ford Motor Company that, you know, we - or our own, that we were out to make more than what we were entitled to.

Tr.Vol. 10-107, 108.

31. Article II, Section 6 of the SUB Plan provides:

> (a) If the Company or the Board shall determine that any Benefit paid under the Plan should not have been paid or should have been paid in a lesser amount (as the result of a subsequent disqualification for State System Benefits or otherwise), written notice thereof shall be mailed to the Einploye receiving such Benefit and he shall return the amount of overpayment to the Trustee or Company whichever is applicable; provided, however, that no such repayment shall be required if the cumulative over payment is $3 or less, or if notice has not been given within 120 days from the date the overpayment was established or created, except that no such limitation shall be applicable in cases of fraud or willful misrepresentation.

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Upon receipt of a notice of overpayment, the employee may appeal. Exh. 11; Art. V, § 3. If the employee fails to return the overpayment promptly, the trustee may deduct the amounts owed either from future SUB benefits or from the employee's paycheck. Id.; Art.II, § 6(b). After Mr. Rose was recalled to theLouisville Assembly Plant, Ford deducted a total of $3,801 from his wages. Recovered. overpayments are returned to the SUB Fund. Shapiro depo. at 48.

32. Because Ms. Wright was never recalled, she has not repaid any overpayment nor has Ford taken action to collect any overpayment from her. Tr.Vol. 10-110. Ms. Wright testified that when she applied for TRA at the state unemployment office, she was told that Ford would request repayment of SUB Funds. Tr.Vol. 10-114.[14]

33. Ford monitored the status of the SUB Fund during 1979-1980, in an effort to project its funding level. Ryder depo. at 49; Patterson depo. at 6; Shapiro depo. at 57-58; Exhs. 59, 61, 66, 67, 84, 85, 100, 123, 129, 133, 150, 159, 161, 186.[15] Monthly

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[14]In 1975, Ford filed an action in New Jersey seeking a judgment against a group of recalled workers,for the full amount of SUB overpayments. The Court held that the exclusive remedy for collection of overpayments was the contract remedy of payroll deduction. Soboleski v. Ford Motor Co., No. 76-2240, Slip Op. (D.N.J. March 11, 1977). Page testified that the decision was consistent with labor law contract interpretation. Tr.Vol. 15-21, 22. Page went on to testify that if workers retired or quit or were never recalled, there was no legal mechanism to collect overpayments. Tr.Vol. 15-23.

[15]Ford knew in the last quarter of 1979 that the SUB Fund level would drop to a point where multiple credit units would be cancelled in order to receive a week's benefit.

reports were prepared by Ferdinand E. Becker (Becker), Ford's labor cost analyst, on the level of assets in the Fund, employees on layoff and Ford's hourly contributions (the "maximum funding reports"). Art. III, § 8; Exh. 11, 123, 129, 133, 151; Tr.Vol. 16: 164-66, 184. When the credit unit cancellation base reached a low level, the reports were prepared weekly. Tr.Vol. 4-63. The reports were delivered to Ford's SUB Plan administrators including Maurice Shapiro, Manager of the Employment Security and Pension Department, William Collison, who worked for Shapiro, and to the UAW. Collison depo. at 11-14; Becker depo. at 21; Patterson depo at 6; Tr.Vol. 16-179, 180. Becker testified that none of the reports prepared during 1979 indicated that the Fund was in danger of being unable to pay benefits.[16] Tr.Vol. 16-166, 174, 176. Prior to 1979, Becker did not rake any projections regarding layoffs. Tr.Vol. 16-174, 176. Neither Becker nor anyone else at Ford projected the impact of recouping SUB overpayments on the SUB Fund until April 16, 1980. Exh. 84; Tr.Vol. 16-203.[17]

Exh. 284. However, Ford's SUB Fund in the Fall of 1979 was the strongest of the Big Three. Tr.Vol. 15-96, 97.

[16]In November, 1979, Becker prepared a projection report which showed the SUB Fund providing unreduced layoff benefits through 1980. Tr.Vol. 16-176.

[17]Becker testified that he performed three main projections on a regular basis:

> One was a cash flow projection. I used to do it for the Trustees. And then there were the SUB model projections that was used to calculate costs of various changes in the plan. And then there were special projections that were requested and those were those projections that reflected changes in the production scheduling .... There was an economic forecast that

34. Mr. Arthur Harris Tepfer, a consulting actuary and the plaintiffs' expert witness, testified that Ford performed administerial functions adequately, but neglected to establish a network within the Company to obtain information crucial to sound financial decisions in regard to the SUB Plan. Tr.Vol. 4-137. Tepfer also testified that Ford did not act responsibly, as Plan fiduciary, in allowing overpayments to occur. Tr.Vol. 5-15. Tepfer also testified that Ford should have put certain forecasting information together earlier. Id.

35. Carl Eric Freden, president of a retirement consulting f irm and a Fellow in the Society of Actuaries since 1977, testified as Ford's expert witness. Freden testified that welfare plans, such as the SUB Plan, "are not defined benefit plan (sic) that have any actuarial basis, they are programs with negotiated contributions that go into the program." Tr.Vol. 16-217. Freden testified that actuaries do not look at short term economic events such as the likelihood of unemployment in a particular industry, because it

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> was related to what we call financial planning volume, and it was based on what our economics department determined the industry would produce in each of the three years in the contract period. And we extracted from that the hours that would be worked and the head counts that would be employed .... I was asked to put in a worst case scenario one year and the second year and try the third year to see how contributions would reflect on the chart .... [A cash flow projection] was done to help the Trustee determine how much money would be available over an extended period of time to invest in securities in the Plan. And it also gave them a feel for what the total amount of the assets that would be carried at that point in time .... Tr.Vol. 16166 to 169.

is not a statistically predictable contingency falling within the area of actuarial competence. Tr.Vol. 16-219.

36. Beginning in August, 1979, at the direction of Robert Middlekauff, Director of Ford's Labor Relations Office, Becker performed mathematical analyses and projections using Fordfs economic forecasting data and monthly reports. Exh. 28, 60; Collison depo. at 12-16, Tr.Vol. 16-193. As late as February 25, 1980, Becker's financial projections showed that the SUB Fund would remain able to satisfy the benefit applications, even though large numbers of employees had been laid off. Tr.Vol. 16-176 to 78; Patterson depo. at 16, 35, 45; Exh. 28, 59. The mid-February production program showed an increase in production activity and a decrease in layoffs. Ford recalled 2,500 employees in February of 1980 Tr.Vol. 3-7-22; Exh. 310. However, the March 27, 1980 forecast, based on a. decrease in production of 300,000 units and a corresponding increase in layoffs predicted that the SUB Fund could become depleted by August, 1980. Tr.Vol. 16-178, 201; Exhs.59 - 61, 66; Patterson depo. at 45.

37. Prior to 1980, the lowest level of the SUB Fund had occurred in January, 1976, when the Fund contained $91.7 million or 37% of maximum funding. Tr.Vol. 16-165; Exh. 428. Even at that level, the Fund was able to pay full benefits to all eligible laid-off workers. Tr.Vol 16-169. In addition, in 3-979, when Ford and the UAW were negotiating a new collective bargaining agreement, Becker's computer model, created to cost out potential demands on the SUB Plan, did not indicate that Ford would be unable to meet future benefit demands of laid-off workers. Tr.Vol. 16-169.

38. Ford's final expert witness was James W. Freeman, a professor at the University of Kentucky in the College of Business and Economics. Mr. Freeman was employed by Ford after this litigation had begun to research the question, "at what

point in time should [Ford] have become aware that its SUB Fund would be unable to pay full benefits to all eligible employees" or, in other words, "when would the indicators with respect to the economy and with respect to (Ford] have suggested that employment was going to fall to such an extent that the SUB Fund might be impacted, might turn into a negative number." Tr.Vol. 17-4.

39 .Freeman's conclusion was that Ford could. not have known that the SUB Fund wa.s in trouble until "sometime late in the first quarter of 1980.11 Tr.Vol-. 17-8. The analysis Freeman conducted to arrive at this finding was based first, on the "substantial number of forecasts" performed by Ford in regard to projected automobile sales in the United States in general which indicated Freeman stated sales would be up in 1980. Tr.Vol. 17-8 to 13. that even though,

> "[Ford's] forecast turned out to be unduly optimistic, they were ranked number one in all economic forecasts for the automobile industry in 1979, that is one out of seven major forecasts, and in 1980 they were third out of seven. So during this time period (Ford's] macroeconomic forecasts were well above average in terms of their predictability.... So from a macroeconomic forecast (sic) no one prior to 1980 was projecting a fall in automobile sales and no one was projecting anything like what actually happened. So Ford was doing better than most people, in fact doing better than. everyone in 1979, doing better than most people in 1980, even though that ultimately turned out the forecasts were wrong, everyone else was wrong by more.

Tr.Vol. 17-16, 17, 19.

Second, Freeman looked at Ford's internal sales and production data. "Ford had predicted that sales would rise during the first half of 1980. And the basis for that was the fact that as late as February of 1980, [Ford] was bringing back workers from layoff and putting them on the assembly lines." Tr.Vol. 17-22. In addition, Ford's SUB Fund had a higher percentage of total funding than the SUB Fund of its competitors. Id. Third, Freeman looked at external variables, "other things that might not be suggested by strict economic analysis, to see if there was anything else out there that might have a bearing on the issue of automobile salesat Ford." Tr.Vol. 17-5. Freeman testified that in 1980, there were two unpredictable elements: 1) an unprecedented drop in automobile sales in the United States and 2) a huge decline in Ford's market share. Tr-Vol. 17-26, 27. Freeman continued,

> The main thing that contributed to poor automobile sales during this time period, number one the economy was weak, and of course that should have been predicted, and that more or less was predicted, everyone was expecting the economy to be flat, decline a little bit but not fall as heavily as it did. So the economy in general was part of it. But the main thing that happened was that there was some external shocks in the system that was above and beyond anyone's attempts to predict. Most importantly there was the oil embargo. We had a situation where the economy was impacted very negatively by the second oil embargo, and of course automobile sales even more impacted because the direct impact of the oil embargo caused the gasoline prices to go up. So you had that problem. Another problem you had as the result of the oil embargo, among other things, was that interest rates hit really unprecedented historic highs of over 20 percent. And so of course when you are talking about borrowing money at 20 percent or 22 percent or 24 percent, prime interest rate plus

> a premium, it's very difficult for anyone to be able to afford a car or a house.... The third situation that directly impacted Ford was the f act that high interest rates and high gas prices make small cars much more desirable. If you are going to buy anything you are going to try to buy something small and save on gas and something small to save on cost. But unfortunately [Ford] was being hit with tremendous amounts of adverse publicity about its one small car, the Pinto. People were waking up every morning and seeing pictures of exploding gas tanks, and this didn't exactly promote sales.
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> So you had a situation where the only kind of cars people wanted to buy were small cars and [Ford's] one small car, or one small car line had been discredited, and so you had a situation there where (Ford] desperately needed to get its Escort out in the lot, but the Escort was still a year away from becoming their new small car. So effectively Ford really had nothing to offer in the market and that-s why theirmarket share plummeted, but all these factors were above and beyond what anyone could have expected to know.

Tr.Vol. 17-28 to 30.

40. As of April 25, 1980, Ford knew that some employees at certified plants would be eligible to receive TR-A for weeks of lay off beginning January 30, 1979. However, until state unemployment agencies were in a position to process and pay TRA claims, TPA was not "received or receivable" for purposes of offsetting TRA from SUB payments. Exh. 76.

41. Page testified that the UAW knew there would be SUB overpayment problems. "We had experienced these in 175 and '77 and we knew that many of the workers would. be upset at the idea that they had to repay the SUB Funds. Even though the

language was clear in the agreement and had been there f or some time, I think going back to 170 or 173.11 Tr.Vol. 14-79.

42. During the Spring and Summer of 1980, Ford and the Union circulated literature among Ford employees with reference to possible overpayments of SUB Funds due to the receipt of TRA benefits. Exhs. 222, 223, 225, 241, 243; Tr.Vol. 10-8, 46, 84, 85, 92, 97, 98; 11-76; 12-32, 33,; 14-80. On April 23, 1980, the UAW sent a notice to all Louisville Assembly Plant UAW members detailing the effects of the Plant's TPA certification and explaining how the employees should proceed. Exh. 243. Ford sent formal, individual overpayment notices by mail in early September. The Ax-thur plaintiffs testified that they received notice of the impending TRA certification by mail or by seeing notices on the Assembly Plant's bulletin board.[18] Tr.Vol. 10-8, 46, 84, 85, 92, 97, 98; 11-76, 80; 12-10 to 18, 32, 33. Plaintiffs did not contact the International Union (the named defendant in this action) requesting information or guidance. The Union informed its members who received SUB benefits during 1979 and through 1980 that TRA benefits might eventually be paid to them and that some SUB benefits might have to be repaid. Page depo. at 68; Exhs. 223, 225F 227, 231, 240, 241, 243, 312, 398 and 400.

43. In order for the state unemployment agencies to process and pay TRA claims, the agencies required employee information from Ford. Ford gathered and disseminated information for

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[18]Ms. Patricia Wright, one of the Arthur plaintiffs, testified that she received a "brochure" notifying her of a possible overpayment, but when she received checks amounting to $7,600 for TRA benefits, she called Ford's Hourly Personnel Office to verify the information and was told by Ford's personnel director, that it was her money to spend. Tr.Vol. 11-71, 72, 115. At that point she had been on indefinite layoff for over a year.

every employee at every plant involved in the UAW"s petition to the state unemployment agencies on request. Collison depo. 37-38; Exhs. 48 and 193. When the state unemployment agency had its processing and payment mechanism in order, and Congressional funding was available, Ford began offsetting TRA against SUB in that state.[19] Collison depo. at 47-49, 54-56; Patterson depo. at 22. Simultaneously, Ford began the process of recoupment of SUB overpayments under Article II, Section 6(a). The SUB Board of Administration determined that the Unemployment Division of Kentucky was in a position by August 4, 1980 to process and pay promptly TRA applications. Exh. 193. Thus, pursuant to the Ryder-Bannon Agreement, TRA benefits were presumed to be "received or receivable" after August 4, 1980, by any Ford employee in Kentucky who was receiving or who had received SUB from January 30, 1979 forward. (Exh. 193).

44. Ford was bound to follow the express terms of the SUB Plan regarding recovery of overpayments. Tr. Vol. 15-21, 22. Additionally, in the mid-seventies, the UAW asked DOL whether TRA benefits could be paid directly to the SUB Fund, thus avoiding the recoupment process entirely. The Solicitor for Labor refused to pay TRA to anyone (including the UAW) other than the individual entitled to receive the benefit. Tr.Vol. 14-89, 90.

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[19]The Congressional appropriation for I-RA funding lapsed in the Summer of 1980 and no monies were immediately available. An emergency appropriation was passed several weeks later. Tr.Vol. 15-14; 16-85. A "handful" of payments were made in Kentucky before funding dried up. Patricia Wright, one of the Arthur plaintiffs, received a TRA check on May 14, 1980. Tr.Vol. 12-4. Wright and another Arthur class member, Wendell Rose, received TRA checks in June, 1980.

45. Ford determined the amount of TRA received by each employee as well as the layoff weeks to which each payment was attributable by using a computer program devised to reconstruct the computations made by the state agencies.[20] The overpayment calculations for the Louisville Assembly Plant were completed by the third week of August, 1980. Exh. 193. The A-rthur plaintiffs received overpayment notices by September 9, 1980 by certified or registered mail. Tr. 11-81; Tr. 12-70; Exh. 253-A.

46. The SUB Plan permits appeals from a determination that an overpayment has occurred. Art. V, § 3, Exh. 11. The overpayment notice also informed plaintiffs of this right. Tr.Vol. 10-13. Plaintiffs appealed to the Local SUB Committee and the Joint Board of Administration. Art. V § 3. Because of the large volume of appeals, the Local Committee was to handle appeals regarding calculation of overpayments while the Joint Board of Administration would hear challenges to Plan interpretation. Exh.181, 250. Despite the division of issues notification, the Arthur plaintiffs presented their arguments to the Joint Board alone. The Joint Board denied the appeals in a written decision dated December 19, 1980. Exh. 181; Tr.Vol. 10-18.

47. After the appeal was lost, the plaintiffs did not voluntarily give up the amounts they received in TRA benefits. Tr.Vol. 10-23; 11-110; 12-24. Ford deducted $30.00 from the weekly paychecks of those employees who had returned to work and $20.00 from the weekly SUB checks of those employees receiving SUB funds pursuant to Art. II, Section 6(b) of the

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[20]The states would not share their calculations with either the UAW or with Ford, refusing on grounds that divulging information about employees would violate privacy rights. Exh. 193; Tr.Vol. 15-9, 10.

Plan. Tr.Vol. 10-23; 11-25). At that point, the Arthur plaintiffs filed a complaint with the Kentucky Labor Cabinet charging Ford with withholding sums from their paychecks in violation of KRS §§337.060 and 337.090. Tr.Vol. 10-17, 52; 11-15 to 17; Exh. 196. Other Arthur plaintiffs, who, like Ms. Wright, never returned to work at Ford, kept the TRA benefit in addition to the SUB funds they had already received.

48. After reviewing the briefs and a Joint Stipulation of Facts, the Kentucky Labor Commissioner dismissed the charges and ruled that the deductions were properly made. Exh. 196. in the meantime, the Arthur plaintiffs filed this action on August 16, 1982.

49. Subsequent to the Arthur appeal, a group' of employees at Ford's Sandusky, Ohio, plant filed an appeal that was presented to the Joint Board Tr.Vol. 15-18 to 20; Exh. 174. The Sandusky employees had received both SUB benefits and TRA, and Ford notified them of their duty to repay retroactive SUB overpayments. Exh. 11; Art. II, § 6. The Sandusky employees challenged the recoupment of overpayments, claiming that Fordls overpayment' notices were delivered beyond the 120 day limit in Article II, Section 6, because they were not issued within 120 days after the company wasn otified that plant employees were receiving TRA. Tr.Vol. 15:18. The Joint Board was evenly divided on the timeliness issue - the three Ford members finding the notice was timely and the three UAW members finding notice was not timely so an Impartial Chairman was called in to break the deadlock as required by the collective bargaining agreement. In the Chairman's Opinion (the Fifield opinion), an overpayment could not be "established or created" within the meaning of the language of the SUB Plan until Ford could determine both the amount of TRA received by the employee and the periods for which he or she received TRA. Tr.Vol. 15-19; Exh. 174. Because the employees received their overpayment notices within 120 days from the date Ford

determined the amounts of TRA received or receivable by the employees, the Chairman found that Ford had timely notified the Sandusky employees of their SUB overpayments. Exh. 174.

CONCLUSIONS OF LAW:

1. These cases were brought pursuant to the - Labor Management Relations Act, Title 29 U.S.C. Section 185(a) (the LMR-A) and the Employee Retirement Income Security Act, Title 29 U.S.C. Section 1132(a), (ERISA). They have been certified as class actions.

2. Defendants have argued previously that class plaintiffs are barred from pursuing remedies in federal court due to failure to exhaust administrative remedies and untimeliness. These arguments have been addressed and rejected in the Court's Order of May 9, 1990 and June 20, 1988, incorporated herein by reference.

3. Through ERISA, Congress has established a broad system to regulate employee benefit plans. ERISA's regulation of employee benefit plans divides the plans into two broad categories: employee pension benefit plans and employee welfare benefit plans. Title 29 U.S.C. § 1002(1) & (2). The Supplemental Unemployment Benefits Plan contained in the collective bargaining agreement constitutes an employee welfare benefit plan as that phrase is used in ERISA. Title 29 U.S.C. § 1002(1).

4. Class plaintiffs are "participants" in this employee welfare benefit plan, as that term is defined under ERISA. Title 29 U.S.C. § 1002(7). Ford is an "employer" within the meaning of ERISA, 29 U.S.C. Section 1002(5) and an "administrator" and "fiduciary" within the meaning of ERISA, 20 U.S.C. Sections 1002(16)(A) and 1102(a). In addition, Ford is an employer engaged in commerce or in an industry or activity

affecting commerce as defined by ERISA. Title 29 U.S.C. § 1003(a).

5. Section 1102(21)(A) of Title 29 mandates that:

> ... [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management management or disposition of its assets ... or ... (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. (Emphasis added)

Because the Board of Administration of the SUB Plan was comprised of three members who represented Ford and three members who represented the UAW and the Board was vested with discretion to' determine the eligibility of an employee under the terms of the Plan, the UAW was a fiduciary with respect to the disposition of the Plan's assets and the administration of the Plan.

6. The Arthur plaintiffs allege that Ford did not notify them of SUB overpayments "within 120 days from the date the overpayment was established or created," as required by the terms of the SUB Plan, and therefore they are not obligated to repay TRA benefits. (See Art. II § 6 (b)) . The defendants in the Arthur action are Ford, the UAW, the SUB Plan, Leland Jackson, Ronald Gettelfinger, Pat Pellilo and Medford Lee individually and as members of the defendant, Plan Local Committee, and the SUB Plan Joint Board of Administration. The Arthur plaintiffs assert that the recoupment process violated

Section 185(a) of the LMRA and Sections 1132(a)(3) and 1132(a)(1)(B) of ERISA.[21]

7. The Delk plaintiffs seek to recover SUB benefits they allege were denied improperly. Named as defendants are Ford, the UAW and the SUB Plan. The Delk plaintiffs allege that Ford breached the terms of the SUB Plan in violation of Title 29 U.S.C. Section 185(a) and Title 29 U.S.C. Sections 1132(a)(1)(B) and 1132(a)(3).

8. Class plaintiffs allege that Ford and the UAW violated their fiduciary duty regarding eligibility determinations under the Plan and that Ford violated its fiduciary duty to preserve the assets of the SUB Fund. Title 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3).

9. Title 29 U.S.C. Section 1104(a)(1) places the following general duties on a fiduciary:

> [A] fiduciary stlall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ...
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
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> (ii) defraying reasonable expenses of administering the plan:

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[21]Claims for relief pursuant to 1-itle 29 U.S.C. Section 1109 brought by plaintiffs in the De7k and Arthur cases were dismissed before trial.

(B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

Ford's actions in controlling and managing the operation and administration of the plan are subjected to ERISA's fiduciary duty standards. The UAW is held to the fiduciary standard set out above only to the extent that it was authorized by the ter ms of the Plan to determine employee eligibility to receive SUB funds. The scope of the defendants administrative duties are fully defined by the CBA which gave rise to the Plan, 'and not by ERISA. The duties of a fiduciary are set forth by ERISA and are not negotiated terms of the CBA.

10. The fiduciary standards of ERISA were derived from the common law of trusts and have been codified with recognition of the special purposes and characteristics of employee benefit plans. Firestone Tire & Rubber Co. v. Bruch, 489 U-S. 101, 109 S.Ct. 948; 103 L.Ed.2d 80 (1989); Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 100 S-Ct. 1723, 64 L.Ed.2d 354 (1980). Prudence is to be measured "according to the objective 'prudent person' standard developed in the common law of trusts." Donovan v. Walton, 609 F.Supp. 1221, 1228 (S.D. Fla. 1985), affld sub nom. Brock v. Walton, 794 F.2d 586 (lith Cir. 1986). 10. ERISA is silent as to the proper standard for a court to apply in reviewing a denial of benefits by the administrator or the f iduciary of a plan. The Supreme Court has addressed this question in Firestone, supra. Recognizing that ERISA "was enacted 'to promote the interests of employees and

their beneficiaries in employee benefit plans, Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90, 103 S.Ct. 2890, 2896 (1983), and to protect contractually defined benefits,' Massachusetts Mutual Life Ins. Co., 473 U.S. at 148, 105 S.Ct. 3093,11 the Court held, in pertinent part:

> Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or. fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

109 S.Ct. at 956, 957. Where the plan grants discretion, in specific terms, the denial of benefits or interpretation of the plan by the trustee or administrator is to be overturned only it is arbitrary and capricious. Cairns v. BridgestonelFirestone, Inc., 802 F.Supp. 152 (N.D.Ohio 1992).

11. Under the LMRA, the appropriate standard of review governing the decisions of trustees or administrators of welfare benefit plans to deny benefits is limited to determining whether the trustees' or administrators' actions were arbitrary and capricious. Firestone, supra.: Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund, 979 F.2d 444 (6th Cir. 1992).

12. As discussed above, the language of the SUB Plan authorizes Ford to determine an employees eligibility to collect SUB benefits. The Plan also permits Ford. to determine the amount of benefit to which an employee is entitled, the number of credit which an employee must surrender to receive a SUB benefit and whether an overpayment has occurred. Art. V. § 2(a); VI. § 1; II. § 6. Such discretion is sufficient to invoke the arbitrary and capricious standard of review under Section 1132(a)(1)(B). Cairns, supra.

13. Under the terms of the SUB Plan, Ford had the duty to pay SUB benefits to eligible employees as long as assets were available. The Plan also required Ford to deduct from SUB benefits, payable for a certain week, amounts of certain unemployment benefits "received or receivable" for that same week. The @rthur plaintiffs were laid off a year before the Delk plaintiffs. The Arthur plaintiffs received SUB benefits when the SUB Fund was able to support payment of those benefits. By the time the Delk plaintiffs experienced layoffs, the Fund was depleted to such an extent that those plaintiffs either received no SUB benefits at all, or received partial SUB benefits. The Delk plaintiffs did not appeal the denial of SUB benefits or the requirement that they surrender a great many units to receive any SUB payment at all because they understood that the Fund was depleted.

14. Given the state of the SUB Fund at the time of the Delk plaintiffs' layoffs and subsequent denial of benefits, the Court finds that Ford's decision to increase the number of credit units to be surrendered in exchange for a SUB benefit which logically resulted in a denial of SUB benefits to the Delk plaintiffs who ran out of credit units was reasonably based on a clear reading of Ford's discretionary duties under the terms of the SUB Plan and was not arbitrary and capricious.

15. Likewise, for the following reasons, the Court finds that Ford's decision to recoup an overpayment of SUB benefits to the Arthur plaintiffs was neither arbitrary nor capricious. The authorization for Ford to require an employee to repay overpayments from the SUB Fund is contained in Article II, §6(b).

16. Certification of the Louisville Assembly Plant did not confer TRA benefits on all laid-off employees. TRA benefits were issued only after an employee applied to the state unemployment compensation agency which in turn, determined the employee's

eligibility to receive TRA benefits, based on criteria which included employment information gathered from Ford.

17. An overpayment was created only when either the unemployment agency or Ford could determine which employees worked on certified.products, whether the employees applied for TRA and how much they were due in TRA payments. Finally, the government funds from which the payments were derived had to be available- Thus, the date the overpayments were established or created was either the date on which the employee actually received a check for TRA benefits or the date on which Ford completed the calculations which enabled it to identify those employees who had received SUB benefit overpayments.

18. As evidenced by the testimony of Mr. Rose and Ms. Wright, each was surprised at the amount of TRA benefit received. The Arthur plaintiffs knew they might receive TRA benefits and they knew that once received, Ford and the UAW would ask them to reimburse the SUB Fund for overpayments because they had been notified of that fact by the company, the union and, in the case of Ms. Rose, the unemployment office. No one questioned the Arthur plaintiffs as to whether they would have been agreeable to repay the SUB Fund had they been notified of the exact amount of their overpayment before they received TRA checks.

19. The plain language of the collective bargaining agreement, reasonably interpreted by the Ryder-Bannon Agreement, provided that TRA benefits would be "receivable" for the purpose of offsetting the amount of SUB benefits paid to laid-off employees by the amount they were eligible to receive in TRA on the date that the state was prepared to pay out TRA benefits. The purpose of the Ryder-Bannon Agreement in setting out a definition of receivable was to implement the intent of the parties in preserving a fund from which laid-off employees could receive benefits.

20. This Court finds that the Arthur plaintiffs were notified by Ford of overpayment of SUB funds within 120 days of the date the overpayment was established or created.[22] Ford's formal notice of overpayment was sent to each Arthur plaintiff in early September, 1980. Tr. Vol. 12-70; Exh. 253-A. Only a few laid-off employees received TRA checks in May and June, 1980, then federal funding ran out. The Kentucky Unemployment Office was in a position to pay the majority of TRA benefits on August 4, 1980, as determined by the SUB Board of Administration. Ford finished its overpayment calculations by the third week in August, 1980 (Exh. 193). Ford's notice of overpayment was timely and Ford's recoupment procedures do not constitute a violation of either the LMRA or ERISA. Therefore, this Court also finds that neither the UAW nor Ford was arbitrary or capricious in affirming Ford's decision on plaintiffs' appeal.

21. The Arthur plaintiffs argue that the Court should find that Ford was equitably estopped from collecting overpayments based on Ford'Is conduct as evidenced by the testimony of Ms. Wright, who received her TRA benefits much earlier than the majority of the Arthur plaintiffs. Ms. Wright's testimony, at most, establishes that she received what she believed was conflicting information in telephone calls to Ford. See fn. 18 at page 23. Ms. Wright's testimony is not sufficient to show either "unawareness of the true facts by the party asserting estoppel" or "detrimental and justifiable reliance by the party asserting estoppel on the representation," both essential elements of equitable estoppel. Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991). Ms. Wright has not, nor can she be compelled

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[22]Ford was not entitled to recover overpayments, "if notice has not been given within 120 days from the date the overpayment was established or created." Art. 11 § 6(a).

to, repay to Ford any alleged overpayment of SUB benefits under the terms of the CBA, since she has never been reemployed by Ford and therefore, she has not suffered a detriment. See Soboleski at fn. 14, page 17.

SUB Fund in accordance with Section 1104(a)(1).

22. Plaintiffs allege violations under Title 29 U.S.C. Section 1132(a)(3). Section 1132(a)(3) authorizes a participant to bring a civil action

> (A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions Of [ERISA] or the terms of the plan."

Plaintiffs argue that they are entitled to equitable relief for the alleged failure of Ford and the UAW to carry out their fiduciary duties regarding the preservation of the assets of the SUB Fund in accordance with Section 1104(a)(1).

23. The Supreme Court in Mertens v. Hewitt Associates, __ U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) held that the terms "other appropriate equitable relief" encompasses only the traditional forms of equitable relief, i.e., an injunction, or restitution. Id. at ___ 113 S.Ct. at 2068-70. mandamus or restitution. Id. at ___ 113 S.Ct. at 2068-70. Compensatory damages are not recoverable. Plaintiffs have avoided testimony regarding the theory of recovery in this case and indeed have requested a separate trial on the issue of damages should they prevail on their claim for breach of fiduciary duty.

24. Before applying ERISA to the facts of this case and assessing Ford's management and administration of the SUB Fund's assets, a point must be made: ERISA does not make a

fiduciary an insurer of a plan's assets. The depletion of the SUB Plan is not the measure of the prudence of the fiduciary. The Court must consider the fiduciary's conduct from the perspective of the "time of the decision," rather than from "the vantage point of hindsight." American Communications Ass'n v. Retirement Plan, 488 F.Supp- 479, 483 (S.D. N.Y. , af f Id 646 F. 2d 559 (2d Cir. 1980) Stark v. United States Trust co. of N.Y. , 445 F.Supp. 670, 678 (S.D.N.Y. 1978); see also, Bryan v. Security Trust Co. , 296 Ky. 95, 176 S.W.2d 104, 110 (1943).

25. Until the end of the first quarter of 1980, Ford could not reasonably have known that the SUB Fund would become depleted to such an extent that only partial benefits or no benefits would be paid to the participants. Therefore, the "Chrysler strategy" characterized as "flawed" by the plaintiffs was a reasonable attempt to preserve the assets of the SUB Fund for the benefit of all participants. Even at the time the Ford petitions were filed (January, 1980) it was not known that recoupment of overpayments was required to keep the Fund solvent.

26. ERISA requires a fiduciary to act "in accordance with the documents and instruments governing the plan .... Title 29 U S.C. § 1104. (a)(D)- The Court must evaluate the "prudence of the fiduciaries under the circumstances prevailing when they make their decision and in light of the alternate , ves available to them-" Marshall v. GlassIMetal Ass'n and Glaziers & Glass workers Pension Plan, 507 F.Supp. 378, 384 (D.Hawaii 1980).

27. F.E. Becker produced a number of studies and forecasts throughout 1979 and 1980 to assess the level of the SUB Fund. In the Fall of 1979, when contract negotiations were held between Ford and UAW, numerous projections were made, depicting different employment scenarios and their

possible effect upon the SUB Fund.. The forecasts indicated that the Fund would remain sound and therefore a change in Ford's contribution level was not required, under the terms of the newly negotiated collective bargaining agreement, until 1982.

28. A fiduciary's conduct is to be judged according to the standards of others acting in a like capacity and familiar with such matters. Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir.), cert. denied, 469 U.S. 1072, 105 S.Ct. 565 (1984).

29. Although the plaintiffs' expert testified that Ford should have done "actuarial studies" no evidence was presented that such studies would have revealed a different result from Mr. BeckerrS projections. In addition, the Court is persuaded by defendants' expert, Mr. Freden, who testified that the type of events upon which the future of the SUB Plan depended were not those typically considered by actuaries, because employment and industry trends are not subject to statistical analysis nor does a welfare benefit plan have an actuarial basis.

30. The sole economic expert testimony was that of James Freeman, Professor of Economics at the University of Kentucky College of Business and Economics. Dr. Freeman testified that, in hisopinion, there was nothing that would have led Ford to anticipate the precipitous drop in sales or the drastic cut in the production schedule until late in the first quarter of 1980. The most compelling testimony from Dr. Freeman, however, was his assertion that within the entire domestic automotive industry, Ford's forecasts and projections for the years at issue were well within the industry standard. In other words, no other domestic automobile manufacturer anticipated the full effect of the economic factors that led to the predicament of the SUB Fund during 1980.

31. The Delk plaintiffs argue that Ford should have filed a TRA petition earlier in order to recoup overpayments and replenish the SUB Fund. The evidence shows that most of Ford's layoffs occurred after the petition was filed and that Ford did not know until almost two months after the petition was filed that extensive layoffs would occur. Marvin Fooks, from the Department of Labor, testif ied that he did not know of a single instance where a prelayoff petition had been processed by the DOL. Fooks depo. at 3637. In light of the UAW's prior experience with TRA petitions at DOL, and the evidence presented as to the circumstances surrounding the automotive industry and the position of the DOL regarding TRA petitions at the time of the filing, it was reasonable and prudent of the UAW to gather information, discuss its strategy with the automakers and take the petition to the DOL when it did.

32. Although "overpayments" were inevitable as a result of the DOL's retroactive impact date, Ford took all reasonable steps to insure that employees were notified of their duty to repay the SUB Funds and to start recoupment procedures as soon as practicable.

33. Even had Ford known of the extent of future layoffs orior to the depletion of the SUB Fund, Ford was not permitted by the terms of the Plan to set aside Plan a@sets to provide for benefit claims which might occur after the Fund was temporarily exhausted. Allen' v. United Mine Workers of America 1979 Benefit Plan, 726 F.2d 352 (7th Cir. 1984).

34. This Court concludes as a matter of law that Ford's actions were not arbitrary or capricious and that given the information available to Ford during the period in question, Ford acted reasonably and prudently even under a de novo standard of review.

35. Plaintiffs complain that Ford did not provide them with copies of the Summary Plan description of the SUB Plan in violation of Title 29 U.S.C. §§ 1024(b) and 1022. The proof shows that Summary Plan Descriptions were available upon request and that copies of the "unabridged" SUB Plan were distributed to all employees.

36. ERISA established rules concerning the preparation and distribution of summary descriptions of employee benefit plans. Title 29 U.S.C. Section 1021(a) imposes on the administrator of an employee benefit plan a duty to disclose to its employees certain types of information about the benefit plan, including a summary plan description. The summary plan description is a document, "written in a manner calculated to be understood by the average plant participant" intended to apprise the participants of their rights and obligations under the plan. Title 29 U.S.C. § 1022. Section 1024(b) sets forth three distribution requirements. First, the plan administrator must furnish a copy of the summary plan description to all participants. 29 U.S.C. § 1024(b)(1). The regulations require the plan administrator to use measures reasonably calculated to insure actual receipt. See 29 C.F.R. § 2520.104b-l(b)(1). Section 1024(b)(2) requires plan administrators' to make copies of the summary plan description available in the a.dministrator's principal office. Third, Section 1024(b)(4) requires plan administrators to provide summary plan descriptions upon written request.

37. There was no testimony from individual plaintiffs at trial regarding a written request for a summary plan description. However, even assuming that the plaintiffs requested a summary plan description in writing and defendants did not take action reasonably necessary to insure that plaintiffs actually received a copy of the summary plan description, plaintiffs suffered no prejudice. In the absence of any proof of prejudice, this Court will not award damages. Paris v.

Profit Sharing Plan, 637 F.2d 357, 362 (5th Cir.), cert. denied, 454 U.S. 836 (1981).

38. As a matter of law, neither Ford nor the UAW nor any of the named defendants breached their fiduciary duty or any other duties to the plaintiffs pursuant to ERISA. Further, as a matter of law, the UAW did not violate the SUB Plan, fail to adequately represent plaintiffs or fail to discharge its duty of fair representation arising under Section 301 of the LMRA. This Court can find no violation of either the LMRA or ERISA on the part of any of the named defendants. Judgment will be entered for the defendants.

An appropriate order has been entered this 29th June, day of 1994.

Ronald E. Meredith, Chief Judge
United States District Court

Counsel of Record

Entered Jun 30, 1994
Jeffrey A. Apperson, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. C-82-0208-L(M)

RICHARD DELK, et al. PLAINTIFFS

V.

FORD MOTOR COMPANY, et al. DEFENDANTS

CONSOLIDATED WITH

CIVIL ACTION NO. C-82-0473-L(M)

JERRY ARTHUR, et al. PLAINTIFFS

V.

FORD MOTOR COMPANY, et al. DEFENDANTS

J U D G M E N T

Based on the Findings of Fact and Conclusions of Law filed this date,

IT IS ORDERED that Judgment be entered in favor of the-defendants, Ford Motor Company, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America and the Ford-UAW Supplemental Unemployment Benefit Plan in the case of Richard Delk, et al. v. Ford Motor Company, et al, C82-0208-L(M) and the complaint of the class plaintiffs against the defendants be and it hereby is dismissed. with prejudice.

IT IS FURTHER ORDERED that Judgment be entered in favor of the defendants Ford. Motor Company, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, the Ford-UAW Supplemental Unemployment Benefit Plan, Leland Jackson, Ronald Gettelfinger, Pat Pellilo and Medford Lee individually and as members of the Plan Local Committee and the Supplemental Unemployment Benefit Plan Joint Board of Administration in the case, Jerry Arthur, et al. v. Ford Motor Company, et al., C 82-0473-L(M), and the complaint of the plaintiff class against the defendants be and it hereby is dismissed with prejudice.

There being no just cause for delay, this is a final and appealable order.

Dated this 29 day of June, 1994

Ronald E. Meredith,
Chief Judge
United States District Court

Entered Jun 30 1994
Jeffrey A. Apperson, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0304P(6th Cir.)
File Name: 96a0304p.06

Nos. 94-6259/6261

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD DELK and HAROLD RAMSEY, on behalf of themselves and as representatives of the class herein defined (94-6259); JERRY ARTHUR, WENDELL ROSE, PATRICIA WRIGHT and STEVE WRIGHT, on behalf of themselves and as representatives of the class herein defined (94-6261),
Plaintiffs-Appellants,

v.

FORD MOTOR COMPANY; FORD-UAW SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW (94-6259/6261); LELAND JACKSON; RONALD GETTLEFINGER; PAT PELLILO; MEDFORD LEE, individually and as members of defendant, FORD UAW SUPPLEMENTAL UNEMPLOYMENT

On Appeal from the United States District Court for the Western District of Kentucky

BENEFIT PLAN LOCAL COMMITTEE;
JOINT BOARD OF ADMINISTRATION OF
THE FORD-UAW SUPPLEMENTAL
UNEMPLOYMENT BENEFIT PLAN
(94-6261),
Defendants-Appellees.

Decided and Filed September 16, 1996

Before: NELSON and MOORE, Circuit Judges;
CLELAND, District Judge,[1]

CLELAND, District Judge. These two consolidated class actions challenge, the administration of the Supplemental Unemployment Benefit Plan ("SUB Plan"), part of the collective bargaining agreement between Ford Motor Company and the UAW. The Appellants are or were hourly paid UAW union members employed by Ford during the late 197Os and the early 1980s, when Ford and other American automobile manufacturers were experiencing a financial crisis, in part as a result of pressure from foreign competition. The Arthur Appellants worked at Ford's Louisville Assembly Plant, and the Delk Appellants worked at the Kentucky Truck Plant. Both challenge the administration of the SUB Plan during this time of financial difficulty, particularly in relation to the Trade Readjustment Allowances provided under the Federal Trade Expansion Act of 1962. The issues presented by the Delk Appellants are whether the district court applied the proper standard of care applicable to the fiduciary-employer of an ERISA-governed plan designed to provide benefits to workers

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[1]The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

laid off by the employer and whether they have standing to recover benefits directly to them, as opposed to the SUB Plan. The Arthur Plaintiffs ask this court to determine that Ford breached the SUB Plan by failing timely to notify the them of overpayments of SUB benefits before it acted to recoup those overpayments. After examining the district court's exceptionally thorough Findings of Fact and Conclusions of Law, we find no error and affirm,

I.

Appellants do not challenge the district court's findings of fact, but a review of the rather complex factual background in which this case arose is necessary to an understanding of the issues raised on appeal. Accordingly, we set forth the background facts at length here.

The SUB Plan is a benefit provided in the collective bargaining agreement between Ford and the UAW. As its name implies, the SUB Plan offers eligible laid off workers extra unemployment benefits during temporary production downturns, to supplement state or federal unemployment benefits. SUB Plans were created in the UAW's 1955 collective bargaining agreement with Ford, General Motors, and Chrysler. The Ford SUB Fund is funded solely by contributions from Ford based on a formula set forth in the Plan.

Employees accumulate credit units based upon actual weeks worked up to a maximum of 52 credits. When employees are laid off, they surrender credit units to receive SUB benefits. The number of credit units required to obtain a benefit for any given week is a function of the level of the Fund, the credit unit cancellation base and the employees seniority. As the SUB Fund level and the credit unit cancellation base decrease, less senior employees surrender

more credit units than more senior employees. If the credit unit cancellation base drops below a level set forth in the Plan, employees with less than 10 years' seniority are not entitled to any SUB benefits.

An employee has no unqualified right to receive SUB benefits; the SUB Plan expressly states that "No person shall have any right, title or interest in or to any of the assets of the Fund..." Nevertheless, to the extent that funds are available, an eligible laid off employee is entitled to receive--and Ford is obligated to pay--SUB benefits. The employee's benefit is "an amount which, when added to his State Benefit and Other Compensation, will equal 95% of his Weekly After-Tax Pay minus $12.50...."

The Plan expressly includes as a "state" benefit Trade Readjustment Allowances provided under the Federal Trade Expansion Act of 1962 ("TRA"). TRA is a benefit payable to certain eligible workers laid off because of declining sales due in significant part to competitive imported products. 19 U.S.C. §2271 et seq. (West 1980).

In order for TRA to have any impact on a laid off worker's SUB benefit, it must be "received or receivable. "Otherwise, TRA cannot be taken into consideration in deciding the amount of SUB to which a laid off employee is entitled. The same is true of any "State Benefit or Other Compensation." In other words, unless and until TRA is "received or receivable," an employee is contractually entitled to a SUB payment calculated without reference to that "state" benefit; for purposes of the SUB Plan, it is as if the TRA benefit does not exist until it becomes "received or receivable."

For TRA to be awarded, a group of three employees, or the employees' authorized representative, must petition the United States Department of Labor ("Labor") for certification

of a plant. The test for certification is whether, in Labor's determination, "Increases of imports of articles like or directly competitive with articles produced by" the plant have "contributed importantly to" layoffs and declines in production or sales at that facility. 19 U.S.C. §2272 (West 1980). If certification is granted, Labor sets an "impact date," i.e., the date on which layoffs due to foreign competition are deemed to have begun. Once Labor certifies a plant, the process is turned over to the relevant state unemployment insurance agency to receive, process and, if warranted, pay claims for TRA benefits filed by individual plant workers. 19 U.S.C. §2311 (West 1980), While Labor makes the determination as to whether a plant should be certified for TRA, state unemployment agencies decide whether a particular employee at the plant is eligible for TRA and, if so, for which weeks.

Although Labor may certify a plant, not all employees at that plant may be eligible to receive TRA benefits. First, Labor may issue only a partial certification, in which some--but not all--of the vehicles or parts made at that site are certified as being impacted by imported goods. Thus, laid off employees in those plants who do not work on certified products are ineligible for TRA. Second, even workers on certified products are not eligible for TRA if they fail to meet Labor's "26 week test," which requires that the employee work a total of 26 weeks in the prior 52 weeks on a certified product, and receive a certain specified level of wage. Based on his earlier experience with TRA from 1975 to 1979, Leonard Page, Associate General Counsel for the UAW, estimated that 10 to 20% of the workers at a certified plant would be found ineligible for TRA benefits.

In 1979, Ford, General Motors and Chrysler began laying off tens of thousands of employees due to a downturn in automobile and trick sales in the United States caused in part by increasing foreign competition. Pursuant to the SUB Plans

in effect at the three companies, laid off UAW workers made applications for and received benefits from the SUB Funds.

In the summer of 1979, Leonard Page, the UAW's unofficial Trade Act Coordinator, began to contemplate the possibility of obtaining TRA benefits for UAW. members nation-wide. The UAW traditionally filed TRA petitions on behalf of its members, and viewed this as its responsibility. The UAW's goal, of course, was to gain maximum benefits for all affected UAW members.

However, Page and the UAW were concerned about the viability of an industry-wide TRA petition. In previous experiences with TRA, there was litigation between the UAW and Labor over whether the large American-made cars could ever be "like or directly competitive with" imported subcompacts. In 1975 and 1977, Labor analyzed TRA petitions using a market segment approach and certified primarily U. S. plants that manufactured subcompact or small luxury cars (e.g. Bobcats and Pintos at Ford), In those years, Labor refused to certify approximately 70% of the Ford and Chrysler plants and approximately 90% of the GM plants.

Labor's market segment approach also made it difficult to obtain certification for parts plants. Parts plants typically produced parts for all sizes of cars; to obtain certification for all or a portion of a parts plant, the UAW had to show that some or all parts produced there were ultimately included in a car manufactured by an assembly plant which was certified for TRA. Thus, few parts plants were certified before 1979.

In late 1979, knowing that it faced an uphill battle, the UAW decided not to go with a massive, industry-wide petition but, rather, to present Labor first with the worstcase scenario: Chrysler. Chrysler had experienced the worst layoffs of the Big 3 automakers--its SUB Fund was virtually depleted and the

company was in dire financial straits. This data would make the strongest case of injury to the truck and midsize and luxury car markets from smaller imported vehicles. If Labor granted the Chrysler petition, it would establish a precedent that larger model cars and trucks were "like or directly competitive with" smaller, import models. At that point, Labor would be hard pressed to deny certification to Ford or GM plants that made similar size and model vehicles.

At the same time that the UAW was formulating its "Chrysler First" strategy, from July through October of 1979, Ford's SUB Fund was under special scrutiny by Ford and the UAW as they negotiated a new collective bargaining agreement. F. E. Becker, the SUB Fund Analyst in Ford's Finance Department, used a computer model to cost out the potential UAW demands concerning the SUB Plan, taking into account the current Fund level and projected layoffs. At no time during the negotiations did Becker's model show that the Fund would be unable to meet the benefit demands of laid off workers, and the UAW was satisfied that the SUB Fund would survive any demands based on the projected economic outlook.

Even after the negotiations ended, Becker continued to prepare projections of SUB Fund levels based upon Ford's vehicle production plans and monthly reports of SUB applications made and benefits. His December 1979 projection showed that the SUB Fund would contain $125.3 million in assets by December 1980, which equated to 41% of maximum funding, a healthy fund.

On November 6, 1979--when Ford was still projecting a healthy fund through December of 1980--Labor-certified all but one of the plants in the UAW's Chrysler mass petition. The UAW was surprised by the scope of its success. Now knowing the potential scope of certification, UAW immediately commenced work on petitions for Ford and GM plants

Collecting the necessary information and data for the Ford and GM petitions was a massive undertaking. UAW plant representatives gathered data with assistance from Ford, and provided Page with all the information he requested to complete the petition.

Several events required Page to postpone filing the petitions until late January 1980. First, layoffs at Ford and GM continued to increase, and Page repeatedly amended the draft petitions to include the new data. Second, in January 1980, Page called Marvin Fooks at Labor to notify him that the GM and Ford petitions would soon be filed. Fooks told Page that a major problem in Labor's investigation of the Chrysler petition was gathering sufficient data to determine which parts plants should be certified. Fooks asked Page to provide such data to Labor in the Ford and GM petitions; Fooks specifically instructed Page to file comprehensive petitions and not to "piecemeal" him.

The UAW filed the Ford petition on January 30, 1980. The Ford petition sought certification of 59 Ford plants, including the Louisville Assembly Plant and the Kentucky Truck Plant.

In February 1980, the month after the Ford TRA petition was filed, Becker's forecasts still showed that the SUB Fund would remain healthy and able to satisfy the benefit applications of eligible workers, notwithstanding increasing numbers of layoffs. Ford's economic forecasts and projections were as accurate, if not more so, than those of any other automaker. Indeed, the mid-February production program called for an increase in production activity and a corresponding decrease in layoffs; it was also anticipated that as many as 4,500 employees (approximately 10% of those then on indefinite layoff) would be recalled. In fact, Ford recalled 2,500 employees in February of 1980.

However, the March 1980 production program presented a much different picture--a precipitous decrease in production of 300,000 units, and a corresponding increase in layoffs. Becker's March 27, 1980 prediction, based on this dramatically different production program, forecast that the SUB Fund could become depleted by August 1980.

In March, UAW and Ford representatives met to discuss ways to accelerate the ability to offset TRA from SUB, if Labor certified Ford plants, thereby minimizing payouts from the SUB Fund. Under the UAW-Ford Collective Bargaining Agreement, no changes in SUB Plan terms could be made during the life of the Agreement; however, Ford and the UAW could jointly interpret SUB Plan provisions. Under the express terms of the SUB Plan, TRA could not be taken into account in computing SUB benefits unless and until it was "received or receivable." Until then, an eligible employee was contractually entitled to a SUB benefit calculated without reference to any potential TRA.

The term "received or receivable" is not defined in the SUB Plan. Historically, Ford and the UAW had interpreted the term to mean that time when an individual employee had made an application for TRA for the same week he or she was seeking SUB, and had either received a TRA payment or was about to do so. This definition of "receivable" was too restrictive in the context of TRA payments. The Trade Act contained no deadline for when an employee must apply for TRA (or, indeed, any requirement that an application be made at all), and employees receiving SUB benefits had little incentive to apply for TRA. Thus, under the old interpretation of "received or receivable," Ford could be prevented from offsetting TRA from SUB indefinitely, since each employee was actually required to apply for TRA before TRA could have any effect on his or her SUB payments.

On the other hand experience had shown that there was likely to be a lag between the date on which a plant was certified for TRA and the date on which benefits would be received--if at all--by individual workers. Typically, approximately 10-20% of workers at a certified plant would be ineligible for TRA because of partial certifications and the "26 week test." Further, it usually took months for the state agencies to gear up to accept TRA applications and to be in a position to pay TRA benefits. Therefore, if TRA benefits were deemed "receivable" when a plant was certified, SUB benefits, upon which laid off workers depended to replace their lost salaries, would be reduced or eliminated because of TRA benefits that might be delayed for many months--or never paid at all. In short, if benefits were deemed "received or receivable" too late, employees would enjoy double benefits at the expense of the fund (and, therefore, some fellow employees). On the other hand, if benefits were deemed "received or receivable" too soon, workers might have a lapse in benefits. To complicate the matter, workers had no obligation to inform the fund when they received TRA, and, in fact, they had an incentive to conceal that information in order to impede recoupment of overpayments.

On April 8, 1980, Ford and the UAW entered into the Ryder-Bannon Agreement, which reinterpreted the term "receivable" in a way that would help conserve SUB funds if Ford plants were certified without creating hardships for laid off workers. The Ryder-Bannon Agreement provided, in pertinent part:

> When employees have been certified as eligible for TRA, [Ford] will do everything possible to provide the state agency involved with payroll data required to facilitate processing of claims and payment of TRA benefits and otherwise cooperate with the state agency. Based on a

> reasonable time for filing applications and the time the state agency requires to process claims, a date will be established by the SUB Board of Administration for taking account of TRA which employees at each location are eligible to receive in the calculation or recalculation of SUB benefits. The SUB Board of Administration shall closely monitor the performance of the state agencies with the objective of avoiding any interruption in TRA benefits to the extent possible. Upon the date(s) established by the SUB Board of Administration, SUB will be reduced for all employees at each certified location eligible for TRA.

Thus, under this Agreement, TRA benefits were deemed "receivable" by an eligible employee once the state agency was able to process and pay promptly any TRA claims, regardless of whether he or she had actually made a claim for TRA. Ford could deduct the value of TRA benefits from SUB payments without waiting until an employee actually applied for TRA benefits, but laid off workers would receive full SUB benefits (to the extent allowed by the SUB Plan) until TRA benefits were actually available to them. The effect of this agreement was to give incentive to TRA-eligible employees to apply for them. If they did not, their SUB benefits would be reduced by the amount of TRA they would have received if they had applied.

On April 17, and April 25, 1980, Labor certified that some employees at the Louisville Assembly Plant and 56 other Ford plants (not including the Kentucky Truck Plant) would be eligible to apply for TRA. The "impact date" for the Louisville Assembly Plant was set retroactively at January 30, 1979, one year prior to the date of the petition. This retroactivity further compounded the SUB Plan's difficulties; the Trade Act has

since been amended to eliminate the possibility of retroactive impact dates.

As a result of this retroactive certification, certain employees who had been laid off after January 30, 1979, (including the Arthurs) would be eligible for TRA benefits for weeks of layoff for which they had already received SUB and state unemployment benefits equal to 95% of take-home pay. Once TRA benefits for those weeks became "receivable," some of the SUB payments made for those same weeks would become overpayments. Under the terms of the Plan, if Ford determines that an overpayment has occurred, it has the right to recover that amount from the employee if it provides written notice thereof to the employee within 120 days after the overpayment is "established or created."

When Labor certified the 57 Ford plants on April 17 and 25, 1980, the relevant state unemployment agencies were not yet in a position to process and pay TRA claims. Because Ford did not yet know which employees would receive what amounts of TRA, no actual over-payments could be established and Ford could not begin recouping SUB overpayments from laid off workers under the Plan terms. As a result, laid off employees continued to receive the full amount of their SUB benefits for weeks after January 30, 1979, without deduction for TRA.

On June 30, 1980, as a result of benefit payments to over 75,000 laid off workers, the SUB Fund dropped to its lowest level ever. The SUB Plan itself contemplates precisely this situation, where a heavy demand for benefits during a time of extraordinary layoffs temporarily depletes the Fund's assets. In these circumstances, benefit payments are reduced or eliminated depending upon the severity of the depletion and the employee's seniority. However, the Plan also requires Ford to increase the amount of its regular contributions as the Fund

balance decreases, in order to restore the Fund quickly to a healthy funding level.

A large number of hourly workers at the Kentucky Truck Plant, including most members of the Delks' class, were laid off on July 25, 1980. From that date for approximately three and one-half months, laid off Kentucky Truck Plant workers with less than ten years' service (like their counterparts at other Ford plants) received no SUB payments due to the level of the Fund.

By continually monitoring the progress and funding status of the state unemployment agencies, the SUB Board of Administration determined that by August 4, 1980, the Unemployment Division of Kentucky was in a position to process and promptly pay TRA applications upon receipt. The Joint Board is a six-member body; three members are appointed by Ford, and three are appointed by the UAW. Thus, pursuant to the Ryder-Bannon Agreement, TRA benefits were presumed to be "receivable" after August 4, 1980, by Ford employees in Kentucky who were receiving or had received SUB from January 30, 1979 forward. Kentucky was able to make a handful of TRA payments August 4, 1980, but federal funding for TRA temporarily dried up almost immediately. Patricia Wright, one of the Arthur Plaintiffs, received her first TRA check on May 14, 1980. The evidence indicates that this check was the first received by any class member.

As a result, some part of the SUB payments made to Kentucky employees for weeks after January 30, 1979, although contractually required when made, later became overpayments. Under the Plan, if Ford determines that a SUB overpayment exists, it may recoup that amount from the employee provided that "written notice thereof" is given to the employee within 120 days from the date that the overpayment was "established or created." An employee has the right to appeal a notice of

overpayment to the SUB Joint Board of Administration. If no appeal is filed, or if the determination is upheld, then the employee must return the amount to the Plan. If an employee fails to return any overpayment as required by the Plan, then the company can recoup the amount by making deductions from future SUB payments (not to exceed $20 per week) or from future salary (not to exceed $30 per week). The recoupment process requires three things: (1) the company must determine that an overpayment exists; (2) a written notice of the amount of the overpayment must be sent to the employee; and (3) notice 0 the amount of the overpayment must be sent within 120 days of the date on which the overpayment was "established or created."

There were no viable alternatives to recoupment other than following the express terms of the Plan. In previous litigation involving Ford and the UAW in which Ford sought to recover overpayments, the court had ruled that the SUB Plan provisions were the exclusive mechanism by which the company could collect overpayments. *Soboleski v. Ford Motor Co.*, No. 76-2240, Slip. Op. (D. NJ. March 11, 1977). Additionally, in the mid-seventies, the UAW asked Labor whether TRA benefits could be paid directly to the SUB Fund, thus avoiding the recoupment process entirely. The Solicitor for Labor expressly refused to pay TRA to anyone (including the UAW) other than the particular individual entitled to receive the benefit.

Ford promptly set about determining whether an employee's receipt of retroactive TRA would result in a SUB overpayment (and, if so, the amount of the overpayment) so that those individuals could be notified of the amount they owed to the Fund. To do so, Ford had to determine the amount of TRA received by each employee as well as the layoff weeks to which each payment was attributable. Ford asked the various state agencies to supply this information, but the

agencies refused on the ground that divulging information about a particular employee would violate his or her privacy rights. Consequently, Ford had to devise a computer program to reconstruct computations made by the state agencies. Using this program, Ford's central data processing center attempted to determine whether an individual was eligible for TRA, and, if so, the amounts of TRA and the weeks for which TRA was receivable. This information was compared to the amounts and weeks of SUB received by that employee to establish whether he or she had been overpaid from the SUB Fund as a result of the retroactive TRA benefits.

The data processing center completed calculations for the Louisville Assembly Plant employees by the third week of August, 1980. Within one week, the overpayment notices were shipped to the Louisville Assembly Plant with instructions to the personnel department to send them to employees by certified or registered mail immediately upon receipt. The Arthur Plaintiffs received their overpayment notices by September 9, 1980. Even before the formal notices were sent out on September 5, 1980, most employees were aware of their obligations to repay TRA generated SUB overpayments. The UAW and Ford had conducted campaigns designed to notify the employees of their repayment obligations. Literature concerning the topic was circulated among Ford employees during the spring and summer of 1980. On April 23, 1980, the UAW sent a notice to all Louisville Assembly Plant UAW members detailing the effects of the Plant's TRA certification and explaining how the employees should proceed. The Arthur Plaintiffs admit receiving these notices or seeing them on bulletin boards, well before the formal overpayment notices were sent out in early September.

As Arthur Plaintiff Wendell Rose testified, "probably every employee ... realized that they were receiving more than what they should," as a result of the retroactive receipt of TRA.

Indeed, combining his SUB benefits and state unemployment benefits (including TRA), Mr. Rose received approximately double the amount that he would have earned had he been working. And, of course, he was not even working for Ford.

Nevertheless, the Arthurs appealed their overpayment determinations to the SUB Joint Board of Administration, arguing that the overpayment calculations were incorrect and that the recoupment efforts themselves were improper. The Joint Board denied the appeal on December 19, 1980. Because the Arthurs failed to repay SUB voluntarily after that decision, Ford began making deductions from future SUB and/or wages as authorized by the Plan. As to those employees who did not return to work and had exhausted all their SUB benefits, Ford really had no effective recourse to recoup SUB overpayments. Indeed, Arthur Plaintiff Patricia Wright has not repaid any of the SUB overpayments she received. The Arthurs then filed a complaint with the Kentucky Labor Cabinet, charging that Ford had unlawfully withheld sums from their paychecks. The Cabinet dismissed the charges and ruled that the deductions were properly made.

From November 16, 1980 until December 29, 1980, workers with less than ten years' service received slightly reduced SUB payments. Full SUB payments were resumed to all eligible employees on December 29, 1980, when the Fund was restored to a healthy level as a result of Ford's increased contributions.

Under the terms of the SUB Plan, an employee trades credit units for SUB benefits. An employee is allotted credit units based on seniority and number of hours worked. While the Delks were prohibited from or restricted in trading credit units for benefits during that five month period from July to December, thereafter they were able to use their credit units to receive benefits.

II.

The First Issue raised by the Delk Plaintiffs is whether the district court applied the proper standard of care applicable to the fiduciary-employer of an ERISA-governed plan designed to provide benefits to workers laid off by the employer. The Delk Plaintiffs argue that the district Court applied the arbitrary and capricious standard but should have applied the prudent person standard; the defendants argue that the district court did apply the prudent person standard.

The question whether the trial court applied the proper standard of review is an issue of law subject to de novo review. *See Complaint of Paducah Towing Co., Inc.*, 692 F.2d 412, 422 (6th Cir. 1982).

After reviewing the extensive findings of fact and conclusions of law made by the trial court, this court finds that the district court did apply the proper standard of review. The court noted--and the parties do not dispute--(1) that the plaintiffs' claims under the Labor Management Relations Act were subject to the arbitrary and capricious standard, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), *Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444 (6th Cir. 1992); (2) that, under ERISA, where the plan grants discretion in specific terms, the denial of benefits or interpretation of the plan by the trustee or administrator is to be overturned only if it is arbitrary and capricious, *Cairns v. Bridgestone/Firestone, Inc.*, 802 F. Supp. 152 (N.D. Ohio 1992); (3) that claims of wrongful denial of benefits are reviewed under a de novo standard unless the plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); and (4) that, in general, the fiduciary's conduct is measured by

the objective, prudent person standard, 29 U.S.C. § 1104(a)(1)(B).

In accordance with the multiple levels of review prescribed by ERISA and the cases interpreting it, the district court applied different standards in analyzing different decisions. For example, the court applied the arbitrary and Capricious standard to Ford's determination of employees eligibility to collect SUB benefits, the amount of benefit to which each employee was entitled, the number of credits an employee must surrender to receive a SUB benefit, and whether an overpayment occur-red. Findings of Fact and Conclusions of Law, para. 12. It is equally clear that the court applied the prudence standard to the plaintiffs' claims that Ford and the UAW failed to adequately preserve the assets of the SUB Fund. *See* Findings of Fact and Conclusions of Law, para's 22-26, The court stated in this section of its Findings of Fact and Conclusions of Law:

> The Court must evaluate the 'prudence of the fiduciaries under the circumstances prevailing when they make their decision and in light of the alternatives available to them.' *Marshall v. Glass/Metal Ass'n and Glaziers & Glass Workers Pension Plan*, 507 F. Supp. 378, 384 (D. Hawaii 1980).

Findings of Fact and Conclusions of Law, para. 26. The court added, "A fiduciary's conduct is to be judged according to the standards of others acting in a like capacity and familiar with such matters. *Katsaros v. Cody*, 74-4 F.2d 270, 279 (2d Cir.), *cert. denied*, 469 U.S. 1072, 105 S. Ct. 565 (1984). " Findings of Fact and Conclusions of Law, para. 28. This is the objective, prudent person standard which the plaintiffs advocate. After examining all of the plaintiffs' claims, each under its appropriate standard of review, the court concluded:

"This Court concludes as a matter of law that Ford's actions were not arbitrary or capricious and that given the information available to Ford during the period in question, Ford acted reasonably and prudently even under a *de novo* standard of review. " Findings of Fact and Conclusions of Law, para. 34. The court properly judged each alleged impropriety under the appropriate standard.

III.

The Delk Plaintiffs' second issue is whether they have standing to recover benefits directly to them, as opposed to the Plan. The trial court bifurcated the liability and damages issues for trial. Because the trial court found no liability--and this court affirms that determination--there is no need to determine whether the individuals have standing to recover benefits directly to them; no benefits are recoverable by either the plaintiffs or the SUB Plan.

IV.

The Arthur Plaintiffs ask this court to find that Ford breached the SUB Plan by failing timely to notify them of overpayments of SUB benefits before it acted to recoup those overpayments.

The SUB Plan permits Ford to recoup overpayments, unless, *inter alia*, "notice has not been given within 120 days from the date the overpayment was established or created, . . . " This is the phrase the court must interpret. There is no dispute that the Arthur class members received overpayments and received notices of overpayment of SUB, benefits on or about September 9, 1980. The question is when the 120-day period began to run.

Members of the Arthur class argue that the 120-day period began to run on April 17, 1980, when the Secretary of Labor determined and certified the plant at which they worked as sufficiently affected by foreign trade so as to make the workers eligible for TRA benefits. Ford contends that the relevant date is August 4, 1980, the date determined by the Joint Board of Administration pursuant to the Ryder-Bannon Agreement. The trial court did not pinpoint the date on which the overpayments were established or created but rather concluded that, under any reasonable interpretation, they were not established or created more than 120 days before September 9, 1980.

We conclude that the district court was correct in finding that the notice of overpayment was timely and in rejecting the Arthur Plaintiffs' contention that the trigger date should be April 17, 1980. First, on April 17, 1980, no member of the Arthur class had actually received SUB benefits; the first payment was received on May 14, 1980 by Arthur Plaintiff Patricia Wright. Second, while the April 17, 1980 certification by the Department of Labor established that some employees would probably receive TRA benefits, it did not establish which ones would receive them or in what amount. The states themselves had not yet made those determinations in April 1980, and Ford could not have been expected to know the amounts of over payments at that time. It is simply not sensible to construe the phrase "established or created" as April 17, 1980--before any Arthur Plaintiff actually received any TRA benefits and before even the state had determined which employees would receive TRA benefits and in what amounts. Furthermore, if the SUB Plan had begun recoupment in April, employees would have had a lapse in benefits' By waiting, the SUB Plan ensured that workers were receiving benefits.

The earliest the overpayments could possibly have been established or created was May 14, 1980, when the first Arthur

Plaintiff received the first TRA check. It is equally sensible to place the trigger date at August 4, 1980, the date on which the Plan, as modified by the Ryder-Bannon Agreement, permitted Ford to begin offsetting TRA benefits against SUB benefits. The district court's finding is correct.

The findings of fact and conclusions of law of the district court are affirmed in all respects.

No. 96-1625

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

RICHARD DELK and HAROLD RAMSEY,
on behalf of themselves and as representative
of the class herein defined,
Petitioners,

v.

FORD MOTOR COMPANY; FORD-UAW SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT UAW'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioners seek this Court's review based on the following stated questions:

> (1) Whether a defined trustee * under an ERISA-governed plan may rely upon actions performed by non-fiduciaries in order to sustain the fiduciary standard of care?
>
> (2) Whether a corporate fiduciary may rely upon its ignorance of its own conduct in demonstrating its proper discharge of its fiduciary duty?

Respondent, UAW contends that the above-stated questions cannot properly be brought in this Petition because Petitioners did not previously raise these questions below, and therefore they were neither argued to nor decided by the United States Court of Appeals for the Sixth Circuit.

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* The defined trustees of the Ford-UAW Supplemental Unemployment Benefit Plan were manufacturers National Bank of Detroit and Continental Illinois Bank, N.A., neither of which has been identified or named as a respondent in this Petition.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as named on the caption to the Petition and in this Brief In Opposition.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT UAW'S BRIEF IN OPPOSITION

Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter "UAW"), respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the September 16, 1996, Opinion Affirming rendered by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

This is an appeal of the Opinion Affirming of the United States Court of Appeals for the Sixth Circuit: *Richard Delk and Harold Ramsey, on behalf of themselves and as representatives of the class herein defined v. Ford Motor Company; Ford-UAW Supplemental Unemployment Benefit Plan; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America-UAW, Case No. 94-6259, Opinion filed September 16, 1996.* The original Opinion was issued by the United States District Court for the Western District of Kentucky at Louisville granting judgment to the Defendants/Respondents after trial, Civil Action No. C-82-0208-L(M), entered August 26, 1994.

JURISDICTION

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

1. Employee Retirement Income Security Act, 29 U.S.C. §§ 1104, 1132.

2. Trade Act of 1962, 19 U.S.C. §§ 2271, *et seq.*

STATEMENT OF THE CASE

Petitioners claim Respondents Ford Motor Company and Ford-UAW Supplemental Unemployment Benefit Plan ("SUB Plan") breached their fiduciary duty in administering the SUB Plan which was and is part of the Collective Bargaining Agreement between Ford Motor Company and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America-UAW. During the late 1970's and early 1980's, the American automobile industry was experiencing a financial crisis due, in part, to foreign competition. Respectfully, the Petition does not adequately or accurately summarize the evidence head at trial of this matter. The

Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, incorporates by reference the STATEMENT OF THE CASE set forth in Respondents Ford Motor Company and Ford-UAW Supplemental Unemployment Benefit Plan's Brief In Opposition which fairly, accurately and adequately does.

REASONS FOR DENYING THE PETITION

The District Court ruled and United States Court of Appeals for the Sixth Circuit affirmed that Petitioners have not proven a breach of fiduciary duty and the District Court applied the correct standards of review. This Court should deny this Petition for Writ of Certiorari for two reasons. First, the questions Petitioners attempt to have this Court address were never presented to or decided by the Court of Appeals. Second, there are no conflicts among the circuits on the issues presented nor are there any "compelling reasons" that would justify a Writ of Certiorari. Sup. Ct. R. 10.

Respondent UAW is a named party to this proceeding but is not a defined trustee under an ERISA-governed plan, nor, a corporate fiduciary. Neither question presented for review relates to any action or fiduciary duty of Respondent UAW. Accordingly, Respondent UAW supports, endorses and adopts the REASONS FOR DENYING THE PETITION set forth by Respondents Ford Motor Company and Ford-UAW Supplemental Unemployment Benefit Plan in their Brief In Opposition.

CONCLUSION

Respondent, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America-UAW, respectfully requests that the Petition be denied.

Respectfully submitted,

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioners seek this Court's review based on the following stated questions:

> (1) Whether a defined trustee[1] under an ERISA-governed plan may rely upon actions performed by non-fiduciaries in order to sustain the fiduciary standard of care?
>
> (2) Whether a corporate fiduciary may rely upon its ignorance of its own conduct in demonstrating its proper discharge of its fiduciary duty?

Respondents, Ford Motor Company and Ford-UAW Supplemental Unemployment Benefit Plan ("Ford" and "SUB Plan"), contend these questions cannot properly be brought in this Petition since Petitioners never raised them before and they were never decided by the Court of Appeals for the Sixth Circuit. Moreover, the District Court, the only court to examine these particular questions, correctly decided after trial that Ford had satisfied its fiduciary duty in all regards.

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[1] The defined trustees of the Ford-UAW Supplemental Unemployment Benefit Plan were Manufacturers National Bank of Detroit and Continental Illinois Bank, N.A., neither of which has been identified as a respondent in this Petition since they were dismissed as parties to this action, by agreement of the parties, at the commencement of the trial in the District Court.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as named on the caption to the Petition and this Brief in Opposition.

RULE 29.6 LISTING

Pursuant to Sup. Ct. R. 29.6, Respondents state that Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%:

Associates First Capital Corporation
Great Mall of the Bay Area Management Company
The Hertz Corporation

Argentina
- Invercred Compania Financiera S.A.

Australia
- Ford Motor Company of Australia Limited

Belgium
- Ford Credit N.V.
- Ford Motor Company (Belgium) N.V.

Brazil
- Autolatina Comercio e Participacoes Financerias Ltd.

Denmark
- Ford Motor Company A/S

Finland
- Oy Ford Ab

Germany
- Ford Werke-Aktiengesellschaft

Holland
- Ford Nederland B.V.

Japan
- Mazda Motors Corporation

RULE 29.6 LISTING – Continued

Korea
Ford Motor Company of Korea

Netherlands
Ford Credit B.V.

Norway
Ford Motor Norge A.S.

New Zealand
Ford Motor Company of New Zealand Limited

Singapore
Ford Motor Company Private Limited

Switzerland
Ford Motor Company (Switzerland) S.A.

Vietnam
Ford Vietnam Limited

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Pub.L. No. 97-35, 1981 U.S.C.C.A.N. (97 Stat.) 802 16

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Ford Motor Company and Ford-UAW Supplemental Unemployment Benefit Plan (hereinafter "Ford" and "SUB Plan"), respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the September 16, 1996 Opinion Affirming rendered by the United States Court of Appeals for the Sixth Circuit. That Opinion is reported at 96 F.3d 182 (1996).

OPINIONS BELOW

The Opinion Affirming of the United States Court of Appeals for the Sixth Circuit is reprinted as Appendix A to this Brief in Opposition, pages App. 1 through App. 23. The Opinion of the United States District Court for the Western District of Kentucky at Louisville granting judgment to the Defendants/Respondents after trial is reprinted in the Appendix to the Petition, pages 1a-41a.

JURISDICTION

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

1. Employee Retirement Income Security Act, 29 U.S.C. §§1104, 1132.

2. Trade Act of 1962, 19 U.S.C. §§2271, *et seq.*

STATEMENT OF THE CASE

Petitioners in this case claim Respondents breached their fiduciary duty in administering the Supplemental Unemployment Benefit Plan ("SUB Plan"), part of the collective bargaining agreement between Ford Motor Company and the United Autoworkers, during the late 1970's and early 1980's when American automobile manufacturers were experiencing a financial crisis due, in part, to foreign competition. Respectfully, the Petition does not summarize adequately or accurately the evidence heard at trial of this matter. Respondents, therefore, incorporate by reference the statement of facts in the Opinion Affirming of the United States Court of Appeals for the Sixth Circuit, Section I, pages App. 3 to App. 19, attached as Appendix A to this Brief in Opposition.[2]

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[2] The Court of Appeals' statement of facts is entirely consistent with the District Court's findings of fact. As the Court of Appeals noted, "Appellants do not challenge the district court's findings of fact,. . . . " [Appendix A, p. App. 3]. Nevertheless, the Petition is replete with misstatements and inconsistencies. For example, Petitioners characterize SUB benefits as automatic or "guaranteed" [Petition at 3] and state that Ford had a fiduciary "obligation to seek alternative funding" for the SUB Fund as employees were laid off [Petition at 5]. In fact, the SUB Plan specifies that no person has a vested interest in any SUB monies [Art. VII, §7, Appendix B, p. App. 38], and this Court has recognized that SUB benefits are not guaranteed:

> The concept of supplemental unemployment benefits evolved from the demand by organized labor for a guaranteed annual wage. When it became evident that a guaranteed annual wage was impractical in their industries, unions such as . . . the United

REASONS FOR DENYING THE PETITION

Undaunted by the consistent rulings of the District Court and Court of Appeals for the Sixth Circuit in this case that Petitioners have proven no breach of fiduciary duty and the District Court applied correct standards of review, Petitioners now seek yet another review of their meritless action. Their attempt must fail, however, for two reasons. First, the questions they seek to present to

---

> Autoworkers transformed their guaranteed annual wage demands into proposals to supplement existing unemployment compensation programs. These proposals ultimately were adopted in several industries in the form of SUB plans.

Coffy v. Republic Steel Corp., 447 U.S. 191, 200 (1980). Moreover, the SUB Plan specifically contemplates that demand for benefits might reduce the SUB Fund to zero [Art. VII, §5, *e.g.*, Art. VII §5(e), Appendix B, p. App. 32]. In *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), a case relied upon below by Petitioners and involving a SUB plan virtually identical to Ford's, the Sixth Circuit noted that employees "accepted the risk that the SUB benefits would become depleted. . . . " *Drennan, supra* at 249.

Contrary to Petitioners' statements that Ford had no contemporaneous knowledge about the Chrysler strategy for seeking TRA benefits [Petition at 4-5, 6], the record demonstrates that Ford officials not only knew about the Chrysler strategy but assisted the UAW in gathering information necessary to implement it [Petition Appendix, pp. 11a-12a, ¶¶23-24]. Petitioners' suggestion that Ford was lax about recouping SUB overpayments created by the government's retroactive TRA payments to most laid-off Ford employees is also wrong [Petition at 6]. In fact, Ford used the only means available to it, the recoupment process set out in the SUB Plan, and did so expeditiously. [*See*, Appendix A, pp. App. 15 to App. 18, App. 22 to App. 23].

this Court were never addressed or decided by the Court of Appeals. Second, there are no conflicts among the circuits on the issues presented nor are there any "compelling reasons" that would justify a Writ of Certiorari here. Sup. Ct. R. 10.

(A) The Issues Petitioners Ask This Court to Address Were Never Considered by the Court of Appeals

Certiorari should be denied because the particular issues identified by the Petitioners were never presented to the Court of Appeals.

> Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. *Lawn v. United States*, 355 U.S. 339, 362-363, n.16 (1958); *Husty v. United States*, 282 U.S. 694, 701-702 (1931); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

In *Adickes*, the petitioner listed in her certiorari petition an issue which had been addressed by the District Court but never appealed to the Court of Appeals. The Supreme Court declined to review that issue because "the Second Circuit did not rule on these contentions." *Id.* The same is true here.

These Petitioners took one primary and one secondary issue to the Court of Appeals for the Sixth Circuit:

> The primary issue in this case is the proper standard of care applicable to the fiduciary-employer of an ERISA-governed Plan designed to provide benefits to workers laid off by the

> employer. The District Court applied an arbitrary and capricious standard, when the proper standard should be that of a reasonably prudent person acting in like or similar affairs. A secondary issue is whether plaintiffs have standing to recover benefits directly to them, as opposed to the Plan.

Brief for Appellants, Delk and Ramsey, filed in the Sixth Circuit 7/11/95, p. 2. These are the precise issues determined by the Court of Appeals. *See*, Appendix A, pp. App. 19 to App. 22.

The current Petition abandons those two issues. Now, instead of challenging the standard of care under ERISA which was applied by the District Court and affirmed by the Court of Appeals, Petitioners argue that SUB plans are in some undefined way unique among employee benefit plans so that ERISA/common law trust principles cannot apply to determine whether a breach of fiduciary duty has occurred, and this Court should fashion a brand new rule of law [Petition at 7].[3] This issue was never raised in or addressed by the Court of Appeals. In fact, Petitioners argued below that a standard of care provided by ERISA/common law trust principles, the reasonably prudent person standard, should apply.

Nor does this case present any "exceptional circumstances" which would warrant bending the rule that this

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[3] This issue is gleaned from the body of the Petition. The two issues articulated by Petitioners as "Questions Presented For Review" are merely particularized statements of the issue of whether Ford breached its fiduciary duty under the SUB Plan. None of these questions was ever raised in or addressed by the Court of Appeals.

Court will not consider issues never presented to the Court of Appeals. *United States v. Mendenhall*, 446 U.S. 544, 551-552 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). This case does not deal with a conflict between state and federal statutes, as did *Youakim*. Denying review of these issues would not result in the case being decided on "a serious misapprehension of federal constitutional law," as in *Mendenhall*. *Id.* at 551-552 n.5.

Simply put, the issues presented in this Petition were never raised in the Court of Appeals. It is improper, therefore, for Petitioners to seek review of these issues, and Respondents respectfully submit that certiorari should be denied on that basis.

(B) There Are No Compelling Reasons That Justify a Writ of Certiorari Here

1. SUB plans have long been governed by ERISA/common law trust principles

Not only have the issues Petitioners ask this Court to review never been raised before in this litigation, they are diametrically contradictory to the legal position taken by the Petitioners before the District Court and the Court of Appeals. Below, Petitioners consistently acknowledged that ERISA/common law trust principles do apply to SUB plan cases by arguing that one of the ERISA/common law trust standards of care (reasonably prudent person) was the appropriate standard for assessing Ford's conduct, as opposed to another ERISA/common law trust standard (arbitrary and capricious). Now, for the first time, Petitioners argue that traditional trust law principles, as

embodied in ERISA law, do not "fit" a case involving a SUB plan and urge the Court to conjure up a new rule of law.

Petitioners acknowledge that ERISA/common law trust principles create a fiduciary duty, but they want this Court to redefine the standard for reviewing a fiduciary's conduct without reference to ERISA/common law trust rules and with no guidance whatsoever from Petitioners. They demand this without ever having raised the question before the Court of Appeals.

Petitioners' demand does not present this Court with a compelling reason for granting certiorari. There is nothing that makes SUB plans different from other employee benefit plans and there is absolutely no need to fashion a new rule of law relating to the standard of care for fiduciaries of SUB plans. Contrary to Petitioners' assertion, the fact that "the employer [Ford] is both the settlor of the trust and the trustee" [Petition at 7][4] is not unique to SUB plans. Other employee benefit plans, for example, self-funded pension and health plans, are structured the same way.

Moreover, courts uniformly have recognized that SUB plans are "employee welfare benefit plans" subject to ERISA. *See, e.g., Adams, et al. v. General Tire & Rubber Company Supplemental Unemployment Benefit Plan*, 794 F.2d 164 (4th Cir. 1986); *Justice v. Bankers Trust Co., Inc.*, 607 F.

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[4] There is no question that Ford is *not* the trustee of the SUB Plan. The designated trustees were Manufacturers National Bank of Detroit and Continental Illinois Bank, N.A. [*See*, Art. VII, §1, Appendix B, p. App. 24]. This argument is flawed, however, even if Petitioners intended to use the word "fiduciary."

Supp. 527 (N.D. Ala. 1985); *Lumpkin v. International Harvester Co.*, 125 L.R.R.M. 2244 (N.D. Ill. 1986). As such, SUB plans are subject to the same ERISA/common law trust principles and rules of law as any other employee welfare benefit plan under ERISA. Courts have had no difficulty whatsoever applying ERISA/common law trust principles to determine whether a fiduciary breached its fiduciary responsibilities under a SUB plan. *See, Lumpkin v. International Harvester Co., supra; Adams, et al. v. General Tire & Rubber Company Supplemental Unemployment Benefit Plan, supra.*

In fact, the case Petitioners relied upon most significantly in the courts below, *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), addressed precisely that issue in the context of a SUB plan. As Petitioners carefully pointed out in their brief to the Court of Appeals, *Drennan* determined whether General Motors had breached its fiduciary duty under the SUB plan by analyzing precisely the same ERISA provisions that have governed the Courts' consideration in the present case.

> The intent of Congress in enacting ERISA was to protect the "interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans."

977 F.2d at 250, *quoting* 29 U.S.C. §1001(b). Continuing, the Court quoted 29 U.S.C. §1104(a)(1) with approval. This statute holds that the fiduciary must exercise its duties:

> With the care, skill, prudence, and diligence under the circumstances then prevailing

> that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.
>
> 977 F.2d at 251, *quoting* 29 U.S.C. §1104(a)(1)(B) . . . Accordingly, in the context of a SUB plan, the *Drennan* court found that the manufacturer was a fiduciary in the context of the administration of the plan, and that the prudent man standard would be applied to its conduct.

Petitioners' brief to Court of Appeals at 21. Having argued so vehemently below for the application of ERISA/common law trust principles in the context of the Ford-UAW SUB Plan, Petitioners may not now seek a writ of certiorari by arguing the opposite.

2. The District Court applied the appropriate law correctly in finding that Ford satisfied its fiduciary duty

Although they claim ERISA/common law trust law is inapplicable, nowhere in the Petition do the Petitioners attack the District Court's application of the law to the facts. In other words, assuming ERISA/common law trust law principles apply in this case, Petitioners have conceded by their silence that those principles were correctly applied below. Therefore, this case presents no meritorious basis even if this were an appeal, much less a compelling reason for this Court to review this case on certiorari.

The two questions Petitioners would present to this Court for review amount to nothing but Petitioners' challenge to the District Court's conclusion even though Petitioners never raised these questions before the Court of Appeals. To request this Court to consider issues that were essentially conceded by Petitioners at the Court of Appeals is improper and unsupportable. Petitioners offer no justification for resurrecting these issues now.

In any event, the record unequivocally supports the District Court's entry of judgment against Petitioners on their breach of fiduciary duty claim. Petitioners have criticized Ford for: (1) not preparing adequate projections of layoffs and the resulting demand on the SUB Fund; (2) not filing for TRA sooner than the UAW did and allegedly being unaware of the "Chrysler strategy"; and (3) not moving quickly enough to recover SUB benefits from those employees whose subsequent receipt of TRA resulted in their receiving too much SUB. The District Court thoroughly reviewed the evidence relating to each allegation and, in each instance, found that Ford had acted reasonably and prudently in its administration of the SUB Plan.

The District Court rejected Petitioners' first criticism. For months prior to the filing of the TRA petition on January 30, 1980, Ford was calculating the effects that changes in production would have on layoffs and demands for SUB benefits. One month after the TRA petition was filed, Ford's projections still showed a healthy SUB Fund. As the District Court found, "Ford's forecasts and projections for the years at issue were well within the industry standard" [Petition Appendix, p. 38a ¶30].

The District Court also rejected Petitioners' second concern when it found that the timing of the petition for TRA was reasonable. The undisputed evidence showed that the bulk of layoffs had not occurred before January 1980, and the Department of Labor had never processed a TRA petition filed in anticipation of layoffs. Furthermore, the UAW (which historically filed TRA petitions for its members) had received strict instructions from Marvin Fooks at Labor to present a complete petition, including supporting documentation, and not to "piece-meal" him. As the District Court found:

> In light of the UAW's prior experience with TRA petitions at DOL, and the evidence presented as to the circumstances surrounding the automotive industry and the position of the DOL regarding TRA petitions at the time of the filing, it was reasonable and prudent of the UAW to gather information, discuss its strategy with the automakers and take the petition to the DOL when it did.

[Petition Appendix, p. 39a ¶31]. The District Court specifically found that Ford and the UAW did communicate regarding the Chrysler strategy long before the TRA petition for Ford workers was filed [Petition Appendix, pp. 11a-12a ¶¶23-24].

Petitioners' third criticism was disposed of when the District Court found that Ford moved as expeditiously as possible to recover the retroactively-created overpayments and to make employees aware of their obligations to repay SUB. Before it could be determined which

employees might be subject to recoupment (and for what amounts), Ford and the UAW conducted a general informational campaign to notify everyone of the repayment obligation. As soon as TRA was deemed "received or receivable" in Kentucky on August 4, 1980, for example, the company began the calculations to determine which employees would have to repay what amounts of SUB. They completed this task by the third week of August, and sent the notices of overpayment required by the SUB Plan by the first week in September. As the District Court correctly concluded:

> Although "overpayments" were inevitable as a result of the DOL's retroactive impact date, Ford took all reasonable steps to insure that employees were notified of their duty to repay the SUB Funds and to start recoupment procedures as soon as practicable.

[Petition Appendix, p. 39a ¶32]. The District Court also noted that the SUB Plan's recoupment provision was Ford's "exclusive remedy for collection of overpayments." [Petition Appendix, p. 17a ¶32 n. 14].

The majority of the Petitioners were not laid off until July of 1980 – six months after the TRA petition was filed and three months after the TRA petition was granted. The crux of the Petitioners' argument is that Ford should have anticipated that these layoffs would occur at Petitioners' facility, and should have taken some steps to preserve SUB Fund assets for future claims (like theirs) that might arise. However, the SUB Plan does not permit such action. As the District Court concluded:

> Even had Ford known of the extent of future layoffs prior to the depletion of the SUB Fund,

> Ford was not permitted by the terms of the Plan to set aside Plan assets to provide for benefit claims which might occur after the Fund was temporarily exhausted. *Allen v. United Mine Workers of America 1979 Benefit Plan*, 726 F.2d 352 (7th Cir. 1984).

[Petition Appendix, p. 39a ¶33]. After reviewing all of the evidence and the allegations by the Petitioners, the District Court succinctly stated: "Ford acted reasonably and prudently even under a de novo standard of review." [Petition Appendix, p. 39a ¶34]. Unquestionably, the District Court took great care to address each of the Respondents' actions which allegedly constituted a breach of fiduciary duty. Considering all of the evidence, the District Court correctly found that Respondents' conduct was above reproach.

Additionally, Petitioners' new claim that Ford had a fiduciary duty to seek outside sources of funding for the SUB Fund has no legal or factual support. The SUB Plan contains detailed, carefully devised and explicit provisions concerning the funding mechanism for the SUB Fund. [Petition Appendix, p. 3a ¶3-4; Art. VII, §5 in Appendix B, pp. App. 27-37]. Those provisions account for diminishing contributions during times of layoff by increasing the rate of the contributions. Petitioners have never argued that Ford deviated from the prescribed funding mechanism. In essence, their new complaint is a challenge to the structure of the funding mechanism itself, claiming Ford and the UAW should have written it to require Ford to seek alternative sources of revenue. The law does not recognize this argument.

What the SUB Plan dictates about funding is a matter of plan design, not a matter of plan administration. The law cannot entertain this challenge to the SUB Plan's design as an alleged breach of fiduciary duty because plan design is not subject to fiduciary standards.

> Decisions respecting whether to offer a pension plan in the first place and what benefit features a plan should have are not matters of plan administration or pension asset management, but rather relate to the design and sponsorship of the plan. They are expressions of company personnel policy made in the exercise of the employer's management prerogative. . . . such decisions are *settlor* acts, not fiduciary acts, and are immune from scrutiny under ERISA's fiduciary standards.

Bryant v. Food Lion, Inc., 774 F. Supp. 1484, 1491 (D.S.C. 1991) (emphasis in original). *See, also, Communications Workers of America, AFL-CIO v. NYNEX Corp.*, 1997 U.S. Dist. LEXIS 2989 (S.D.N.Y. 1997); *Scardelletti v. Bobo*, 897 F.Supp. 913 (D. Md. 1995); *Siskind v. Sperry Retirement Program, UNISYS*, 47 F.3d 498, 505 (2nd Cir. 1995).

3. Petitioners' original claims cannot recur since Congress amended the Trade Act

Finally, there is no need for this Court to grant review since the situation which gave rise to Petitioners' claims can never repeat itself because Congress amended the Trade Act to eliminate retroactive TRA benefits.[5] One

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[5] Even if this situation could repeat itself, the impact would not be as vast as Petitioners' hyperbole claims. Although Petitioners are correct that "hundreds of thousands of

of the unfortunate facts which led to this case being filed initially was the approximately sixteen-month gap between the dates of the Department of Labor's TRA certifications for numerous Ford plants (when employees learned they were eligible to apply for TRA) and the impact date which Labor established for those plants (the retroactive date from which eligible employees could receive TRA).

Under the Trade Act, 19 U.S.C. §§2271, *et seq.*, as it existed in 1980, TRA benefits were paid to laid-off Ford workers retroactive to the impact date. [*See*, 19 U.S.C. §2291 prior to 1981 amendment, Appendix C, pp. App. 46 to App. 47]. That meant many workers learned in April 1980 (the certification date) that they could receive benefits for periods of layoff beginning January 1979, sixteen (16) months prior. Of course, they had already received SUB payments at the maximum rate for those same weeks of layoff. That meant a retroactive, unavoidable SUB overpayment was created for those who received TRA.

Under the Trade Act as amended in 1981, TRA payments are no longer retroactive. [*See*, 19 U.S.C. §2291, Appendix D, pp. App. 48 to App. 49]. The legislative history of the Trade Act makes clear the effect of the 1981 amendment:

> Section 2 of the bill would substantially eliminate retroactive payments by limiting payments to weeks of unemployment which begin more

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employees" participate in SUB plans, the number affected by the events of 1980 is relatively minuscule, approximately 2,000 employees from a total of over 60,000 who were laid off by Ford.

> than 60 days after the date an approved petition for certification was filed.

Pub.L. No. 97-35, 1981 U.S.C.C.A.N. (97 Stat.) 802.

If that had been the case in 1980, there would have been no legal claim by these Petitioners. Even though the large demand for SUB payments temporarily depleted the Fund, there would have been no argument available to Petitioners that Ford somehow could have used the retroactive TRA payments to stop the flow of monies from the SUB Fund.

The District Court found there was no breach of fiduciary duty by Ford, and that issue was never raised before or decided by the Court of Appeals. In any event, it is not an issue that has current implications because of the 1981 amendment to the Trade Act.

CONCLUSION

Respondents, Ford Motor Company and Ford-UAW Supplemental Unemployment Benefit Plan, respectfully request that the Petition be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0304P (6th Cir.)
File Name: 96a0304p.06

Nos. 94-6259/6261

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD DELK and HAROLD RAMSEY, on behalf of themselves and as representatives of the class herein defined (94-6259); JERRY ARTHUR, WENDELL ROSE, PATRICIA WRIGHT and STEVE WRIGHT, on behalf of themselves and as representatives of the class herein defined (94-6261),	)	ON APPEAL from the United States District Court for the Western District of Kentucky
Plaintiffs-Appellants,	)	No. 94-6259/6261
v.	)	
FORD MOTOR COMPANY; FORD-UAW SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW	)	

(94-6259/6261); LELAND JACKSON; RONALD GETTLEFINGER; PAT PELLILO; MEDFORD LEE, individually and as members of defendant, FORD UAW SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN LOCAL COMMITTEE; JOINT BOARD OF ADMINISTRATION OF THE FORD-UAW SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN (94-6261),

Defendants-Appellees.

Decided and Filed September 16, 1996

Before: NELSON and MOORE, Circuit Judges; CLELAND, District Judge.[6]

CLELAND, District Judge. These two consolidated class actions challenge the administration of the Supplemental Unemployment Benefit Plan ("SUB Plan"), part of the collective bargaining agreement between Ford Motor Company and the UAW. The Appellants are or were hourly paid UAW union members employed by Ford during the late 1970s and the early 1980s, when Ford and

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[6] The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

other American automobile manufacturers were experiencing a financial crisis, in part as a result of pressure from foreign competition. The Arthur Appellants worked at Ford's Louisville Assembly Plant, and the Delk Appellants worked at the Kentucky Truck Plant. Both challenge the administration of the SUB Plan during this time of financial difficulty, particularly in relation to the Trade Readjustment Allowances provided under the Federal Trade Expansion Act of 1962. The issues presented by the Delk Appellants are whether the district court applied the proper standard of care applicable to the fiduciary-employer of an ERISA-governed plan designed to provide benefits to workers laid off by the employer and whether they have standing to recover benefits directly to them, as opposed to the SUB Plan. The Arthur Plaintiffs ask this court to determine that Ford breached the SUB Plan by failing timely to notify the [sic] them of overpayments of SUB benefits before it acted to recoup those overpayments. After examining the district court's exceptionally thorough Findings of Fact and Conclusions of Law, we find no error and affirm.

I.

Appellants do not challenge the district court's findings of fact, but a review of the rather complex factual background in which this case arose is necessary to an understanding of the issues raised on appeal. Accordingly, we set forth the background facts at length here.

The SUB Plan is a benefit provided in the collective bargaining agreement between Ford and the UAW. As its name implies, the SUB Plan offers eligible laid off

workers extra unemployment benefits during temporary production downturns, to supplement state or federal unemployment benefits. SUB Plans were created in the UAW's 1955 collective bargaining agreement with Ford, General Motors, and Chrysler. The Ford SUB Fund is funded solely by contributions from Ford based on a formula set forth in the Plan.

Employees accumulate credit units based upon actual weeks worked up to a maximum of 52 credits. When employees are laid off, they surrender credit units to receive SUB benefits. The number of credit units required to obtain a benefit for any given week is a function of the level of the Fund, the credit unit cancellation base and the employees' seniority. As the SUB Fund level and the credit unit cancellation base decrease, less senior employees surrender more credit units than more senior employees. If the credit unit cancellation base drops below a level set forth in the Plan, employees with less than 10 years' seniority are not entitled to any SUB benefits.

An employee has no unqualified right to receive SUB benefits; the SUB Plan expressly states that "No person shall have any right, title or interest in or to any of the assets of the Fund. . . . " Nevertheless, to the extent that funds are available, an eligible laid off employee is entitled to receive – and Ford is obligated to pay – SUB benefits. The employee's benefit is "an amount which, when added to his State Benefit and Other Compensation, will equal 95% of his Weekly After-Tax Pay minus $12.50. . . . ."

The Plan expressly includes as a "state" benefit Trade Readjustment Allowances provided under the Federal Trade Expansion Act of 1962 ("TRA"). TRA is a benefit payable to certain eligible workers laid off because of declining sales due in significant part to competitive imported products. 19 U.S.C. § 2271 *et seq.* (West 1980).

In order for TRA to have any impact on a laid off worker's SUB benefit, it must be "received or receivable." Otherwise, TRA cannot be taken into consideration in deciding the amount of SUB to which a laid off employee is entitled. The same is true of any "State Benefit or Other Compensation." In other words, unless and until TRA is "received or receivable," an employee is contractually entitled to a SUB payment calculated without reference to that "state" benefit; for purposes of the SUB Plan, it is as if the TRA benefit does not exist until it becomes "received or receivable."

For TRA to be awarded, a group of three employees, or the employees' authorized representative, must petition the United States Department of Labor ("Labor") for certification of a plant. The test for certification is whether, in Labor's determination, "increases of imports of articles like or directly competitive with articles produced by" the plant have "contributed importantly to" layoffs and declines in production or sales at that facility. 19 U.S.C. § 2272 (West 1980). If certification is granted, Labor sets an "impact date," *i.e.*, the date on which layoffs due to foreign competition are deemed to have begun. Once Labor certifies a plant, the process is turned over to the relevant state unemployment insurance agency to receive, process and, if warranted, pay claims for TRA benefits filed by individual plant workers. 19

U.S.C. § 2311 (West 1980). While Labor makes the determination as to whether a plant should be certified for TRA, state unemployment agencies decide whether a particular employee at the plant is eligible for TRA and, if so, for which weeks.

Although Labor may certify a plant, not all employees at that plant may be eligible to receive TRA benefits. First, Labor may issue only a partial certification, in which some – but not all – of the vehicles or parts made at that site are certified as being impacted by imported goods. Thus, laid off employees in those plants who do not work on certified products are ineligible for TRA. Second, even workers on certified products are not eligible for TRA if they fail to meet Labor's "26 week test," which requires that the employee work a total of 26 weeks in the prior 52 weeks on a certified product, and receive a certain specified level of wage. Based on his earlier experience with TRA from 1975 to 1979, Leonard Page, Associate General Counsel for the UAW, estimated that 10 to 20% of the workers at a certified plant would be found ineligible for TRA benefits.

In 1979, Ford, General Motors and Chrysler began laying off tens of thousands of employees due to a downturn in automobile and truck sales in the United States caused in part by increasing foreign competition. Pursuant to the SUB Plans in effect at the three companies, laid off UAW workers made applications for and received benefits from the SUB Funds.

In the summer of 1979, Leonard Page, the UAW's unofficial Trade Act Coordinator, began to contemplate

the possibility of obtaining TRA benefits for UAW members nation-wide. The UAW traditionally filed TRA petitions on behalf of its members, and viewed this as its responsibility. The UAW's goal, of course, was to gain maximum benefits for all affected UAW members.

However, Page and the UAW were concerned about the viability of an industry-wide TRA petition. In previous experiences with TRA, there was litigation between the UAW and Labor over whether the large American-made cars could ever be "like or directly competitive with" imported subcompacts. In 1975 and 1977, Labor analyzed TRA petitions using a market segment approach and certified primarily U.S. plants that manufactured subcompact or small luxury cars (*e.g.* Bobcats and Pintos at Ford). In those years, Labor refused to certify approximately 70% of the Ford and Chrysler plants and approximately 90% of the GM plants.

Labor's market segment approach also made it difficult to obtain certification for parts plants. Parts plants typically produced parts for all sizes of cars; to obtain certification for all or a portion of a parts plant, the UAW had to show that some or all parts produced there were ultimately included in a car manufactured by an assembly plant which was certified for TRA. Thus, few parts plants were certified before 1979.

In late 1979, knowing that it faced an uphill battle, the UAW decided not to go with a massive, industry-wide petition but, rather, to present Labor first with the worst-case scenario: Chrysler. Chrysler had experienced the worst layoffs of the Big 3 automakers – its SUB Fund was virtually depleted and the company was in dire

financial straits. This data would make the strongest case of injury to the truck and midsize and luxury car markets from smaller imported vehicles. If Labor granted the Chrysler petition, it would establish a precedent that larger model cars and trucks were "like or directly competitive with" smaller, import models. At that point, Labor would be hard pressed to deny certification to Ford or GM plants that made similar size and model vehicles.

At the same time that the UAW was formulating its "Chrysler First" strategy, from July through October of 1979, Ford's SUB Fund was under special scrutiny by Ford and the UAW as they negotiated a new collective bargaining agreement. F.E. Becker, the SUB Fund Analyst in Ford's Finance Department, used a computer model to cost out the potential UAW demands concerning the SUB Plan, taking into account the current Fund level and projected layoffs. At no time during the negotiations did Becker's model show that the Fund would be unable to meet the benefit demands of laid off workers, and the UAW was satisfied that the SUB Fund would survive any demands based on the projected economic outlook.

Even after the negotiations ended, Becker continued to prepare projections of SUB Fund levels based upon Ford's vehicle production plans and monthly reports of SUB applications made and benefits. His December 1979 projection showed that the SUB Fund would contain $125.3 million in assets by December 1980, which equated to 41% of maximum funding, a healthy fund.

On November 6, 1979 – when Ford was still projecting a healthy fund through December of 1980 – Labor certified all but one of the plants in the UAW's Chrysler

mass petition. The UAW was surprised by the scope of its success. Now knowing the potential scope of certification, UAW immediately commenced work on petitions for Ford and GM plants. Collecting the necessary information and data for the Ford and GM petitions was a massive undertaking. UAW plant representatives gathered data, with assistance from Ford, and provided Page with all the information he requested to complete the petition.

Several events required Page to postpone filing the petitions until late January 1980. First, layoffs at Ford and GM continued to increase, and Page repeatedly amended the draft petitions to include the new data. Second, in January 1980, Page called Marvin Fooks at Labor to notify him that the GM and Ford petitions would soon be filed. Fooks told Page that a major problem in Labor's investigation of the Chrysler petition was gathering sufficient data to determine which parts plants should be certified. Fooks asked Page to provide such data to Labor in the Ford and GM petitions; Fooks specifically instructed Page to file comprehensive petitions and not to "piece-meal" him.

The UAW filed the Ford petition on January 30, 1980. The Ford petition sought certification of 59 Ford plants, including the Louisville Assembly Plant and the Kentucky Truck Plant.

In February 1980, the month after the Ford TRA petition was filed, Becker's forecasts still showed that the SUB Fund would remain healthy and able to satisfy the benefit applications of eligible workers, notwithstanding increasing numbers of layoffs. Ford's economic forecasts

and projections were as accurate, if not more so, than those of any other automaker. Indeed, the mid-February production program called for an increase in production activity and a corresponding decrease in layoffs; it was also anticipated that as many as 4,500 employees (approximately 10% of those then on indefinite layoff) would be recalled. In fact, Ford recalled 2,500 employees in February of 1980.

However, the March 1980 production program presented a much different picture – a precipitous decrease in production of 300,000 units, and a corresponding increase in layoffs. Becker's March 27, 1980 projection, based on this dramatically different production program, forecast that the SUB Fund could become depleted by August 1980.

In March, UAW and Ford representatives met to discuss ways to accelerate the ability to offset TRA from SUB, if Labor certified Ford plants, thereby minimizing payouts from the SUB Fund. Under the UAW-Ford Collective Bargaining Agreement, no changes in SUB Plan terms could be made during the life of the Agreement; however, Ford and the UAW could jointly interpret SUB Plan provisions. Under the express terms of the SUB Plan, TRA could not be taken into account in computing SUB benefits unless and until it was "received or receivable." Until then, an eligible employee was contractually entitled to a SUB benefit calculated without reference to any potential TRA.

The term "received or receivable" is not defined in the SUB Plan. Historically, Ford and the UAW had interpreted the term to mean that time when an individual

employee had made an application for TRA for the same week he or she was seeking SUB, and had either received a TRA payment or was about to do so. This definition of "receivable" was too restrictive in the context of TRA payments. The Trade Act contained no deadline for when an employee must apply for TRA (or, indeed, any requirement that an application be made at all), and employees receiving SUB benefits had little incentive to apply for TRA. Thus, under the old interpretation of "received or receivable," Ford could be prevented from offsetting TRA from SUB indefinitely, since each employee was actually required to apply for TRA before TRA could have any effect on his or her SUB payments.

On the other hand, experience had shown that there was likely to be a lag between the date on which a plant was certified for TRA and the date on which benefits would be received – if at all – by individual workers. Typically, approximately 10-20% of workers at a certified plant would be ineligible for TRA because of partial certifications and the "26 week test." Further, it usually took months for the state agencies to gear up to accept TRA applications and to be in a position to pay TRA benefits. Therefore, if TRA benefits were deemed "receivable" when a plant was certified, SUB benefits, upon which laid off workers depended to replace their lost salaries, would be reduced or eliminated because of TRA benefits that might be delayed for many months – or never paid at all. In short, if benefits were deemed "received or receivable" too late, employees would enjoy double benefits at the expense of the fund (and, therefore, some fellow employees). On the other hand, if benefits were deemed "received or receivable" too soon, workers

might have a lapse in benefits. To complicate the matter, workers had no obligation to inform the fund when they received TRA, and, in fact, they had an incentive to conceal that information in order to impede recoupment of overpayments.

On April 8, 1980, Ford and the UAW entered into the Ryder-Bannon Agreement, which reinterpreted the term "receivable" in a way that would help conserve SUB funds if Ford plants were certified without creating hardships for laid off workers. The Ryder-Bannon Agreement provided, in pertinent part:

> When employees have been certified as eligible for TRA, [Ford] will do everything possible to provide the state agency involved with payroll data required to facilitate processing of claims and payment of TRA benefits and otherwise cooperate with the state agency. Based on a reasonable time for filing applications and the time the state agency requires to process claims, a date will be established by the SUB Board of Administration for taking account of TRA which employees at each location are eligible to receive in the calculation or recalculation of SUB benefits. The SUB Board of Administration shall closely monitor the performance of the state agencies with the objective of avoiding any interruption in TRA benefits to the extent possible. Upon the date(s) established by the SUB Board of Administration, SUB will be reduced for all employees at each certified location eligible for TRA.

Thus, under this Agreement, TRA benefits were deemed "receivable" by an eligible employee once the state agency was able to process and pay promptly any TRA

claims, regardless of whether he or she had actually made a claim for TRA. Ford could deduct the value of TRA benefits from SUB payments without waiting until an employee actually applied for TRA benefits, but laid off workers would receive full SUB benefits (to the extent allowed by the SUB Plan) until TRA benefits were actually available to them. The effect of this agreement was to give incentive to TRA-eligible employees to apply for them. If they did not, their SUB benefits would be reduced by the amount of TRA they would have received if they had applied.

On April 17, and April 25, 1980, Labor certified that some employees at the Louisville Assembly Plant and 56 other Ford plants (not including the Kentucky Truck Plant) would be eligible to apply for TRA. The "impact date" for the Louisville Assembly Plant was set retroactively at January 30, 1979, one year prior to the date of the petition. This retroactivity further compounded the SUB Plan's difficulties; the Trade Act has since been amended to eliminate the possibility of retroactive impact dates.

As a result of this retroactive certification, certain employees who had been laid off after January 30, 1979, (including the Arthurs) would be eligible for TRA benefits for weeks of layoff for which they had already received SUB and state unemployment benefits equal to 95% of take-home pay. Once TRA benefits for those weeks became "receivable," some of the SUB payments made for those same weeks would become overpayments. Under the terms of the Plan, if Ford determines that an overpayment has occurred, it has the right to recover that amount from the employee if it provides

written notice thereof to the employee within 120 days after the overpayment is "established or created."

When Labor certified the 57 Ford plants on April 17 and 25, 1980, the relevant state unemployment agencies were not yet in a position to process and pay TRA claims. Because Ford did not yet know which employees would receive what amounts of TRA, no actual overpayments could be established and Ford could not begin recouping SUB overpayments from laid off workers under the Plan terms. As a result, laid off employees continued to receive the full amount of their SUB benefits for weeks after January 30, 1979, without deduction for TRA.

On June 30, 1980, as a result of benefit payments to over 75,000 laid off workers, the SUB Fund dropped to its lowest level ever. The SUB Plan itself contemplates precisely this situation, where a heavy demand for benefits during a time of extraordinary layoffs temporarily depletes the Fund's assets. In these circumstances, benefit payments are reduced or eliminated depending upon the severity of the depletion and the employee's seniority. However, the Plan also requires Ford to increase the amount of its regular contributions as the Fund balance decreases, in order to restore the Fund quickly to a healthy funding level.

A large number of hourly workers at the Kentucky Truck Plant, including most members of the Delks' class, were laid off on July 25, 1980. From that date for approximately three and one-half months, laid off Kentucky Truck Plant workers with less than ten years' service (like their counterparts at other Ford plants) received no SUB payments due to the level of the Fund.

By continually monitoring the progress and funding status of the state unemployment agencies, the SUB Board of Administration determined that by August 4, 1980, the Unemployment Division of Kentucky was in a position to process and promptly pay TRA applications upon receipt. The Joint Board is a six-member body; three members are appointed by Ford, and three are appointed by the UAW. Thus, pursuant to the Ryder-Bannon Agreement, TRA benefits were presumed to be "receivable" after August 4, 1980, by Ford employees in Kentucky who were receiving or had received SUB from January 30, 1979 forward. Kentucky was able to make a handful of TRA payments August 4, 1980, but federal funding for TRA temporarily dried up almost immediately. Patricia Wright, one of the Arthur Plaintiffs, received her first TRA check on May 14, 1980. The evidence indicates that this check was the first received by any class member.

As a result, some part of the SUB payments made to Kentucky employees for weeks after January 30, 1979, although contractually required when made, later became overpayments. Under the Plan, if Ford determines that a SUB overpayment exists, it may recoup that amount from the employee provided that "written notice thereof" is given to the employee within 120 days from the date that the overpayment was "established or created." An employee has the right to appeal a notice of overpayment to the SUB Joint Board of Administration. If no appeal is filed, or if the determination is upheld, then the employee must return the amount to the Plan. If an employee fails to return any overpayment as required by the Plan, then the company can recoup the amount by making deductions from future SUB payments (not to exceed $20 per

week) or from future salary (not to exceed $30 per week). The recoupment process requires three things: (1) the company must determine that an overpayment exists; (2) a written notice of the amount of the overpayment must be sent to the employee; and (3) notice of the amount of the overpayment must be sent within 120 days of the date on which the overpayment was "established or created."

There were no viable alternatives to recoupment other than following the express terms of the Plan. In previous litigation involving Ford and the UAW in which Ford sought to recover overpayments, the court had ruled that the SUB Plan provisions were the exclusive mechanism by which the company could collect overpayments. *Soboleski v. Ford Motor Co.*, No. 76-2240, Slip. Op. (D. N.J. March 11, 1977). Additionally, in the mid-seventies, the UAW asked Labor whether TRA benefits could be paid directly to the SUB Fund, thus avoiding the recoupment process entirely. The Solicitor for Labor expressly refused to pay TRA to anyone (including the UAW) other than the particular individual entitled to receive the benefit.

Ford promptly set about determining whether an employee's receipt of retroactive TRA would result in a SUB overpayment (and, if so, the amount of the overpayment) so that those individuals could be notified of the amount they owed to the Fund. To do so, Ford had to determine the amount of TRA received by each employee as well as the layoff weeks to which each payment was attributable. Ford asked the various state agencies to supply this information, but the agencies refused on the ground that divulging information about a particular

employee would violate his or her privacy rights. Consequently, Ford had to devise a computer program to reconstruct the computations made by the state agencies. Using this program, Ford's central data processing center attempted to determine whether an individual was eligible for TRA, and, if so, the amounts of TRA and the weeks for which TRA was receivable. This information was compared to the amounts and weeks of SUB received by that employee to establish whether he or she had been overpaid from the SUB Fund as a result of the retroactive TRA benefits.

The data processing center completed calculations for the Louisville Assembly Plant employees by the third week of August, 1980. Within one week, the overpayment notices were shipped to the Louisville Assembly Plant with instructions to the personnel department to send them to employees by certified or registered mail immediately upon receipt. The Arthur Plaintiffs received their overpayment notices by September 9, 1980. Even before the formal notices were sent out on September 5, 1980, most employees were aware of their obligations to repay TRA-generated SUB overpayments. The UAW and Ford had conducted campaigns designed to notify the employees of their repayment obligations. Literature concerning the topic was circulated among Ford employees during the spring and summer of 1980. On April 23, 1980, the UAW sent a notice to all Louisville Assembly Plant UAW members detailing the effects of the Plant's TRA certification and explaining how the employees should proceed. The Arthur Plaintiffs admit receiving these notices or seeing them on bulletin boards, well before the

formal overpayment notices were sent out in early September.

As Arthur Plaintiff Wendell Rose testified, "probably every employee . . . realized that they were receiving more than what they should," as a result of the retroactive receipt of TRA. Indeed, combining his SUB benefits and state unemployment benefits (including TRA), Mr. Rose received approximately double the amount that he would have earned had he been working. And, of course, he was not even working for Ford.

Nevertheless, the Arthurs appealed their overpayment determinations to the SUB Joint Board of Administration, arguing that the overpayment calculations were incorrect and that the recoupment efforts themselves were improper. The Joint Board denied the appeal on December 19, 1980. Because the Arthurs failed to repay SUB voluntarily after that decision, Ford began making deductions from future SUB and/or wages as authorized by the Plan. As to those employees who did not return to work and had exhausted all their SUB benefits, Ford really had no effective recourse to recoup SUB overpayments. Indeed, Arthur Plaintiff Patricia Wright has not repaid any of the SUB overpayments she received. The Arthurs then filed a complaint with the Kentucky Labor Cabinet, charging that Ford had unlawfully withheld sums from their paychecks. The Cabinet dismissed the charges and ruled that the deductions were properly made.

From November 16, 1980 until December 29, 1980, workers with less than ten years' service received slightly reduced SUB payments. Full SUB payments were

resumed to all eligible employees on December 29, 1980, when the Fund was restored to a healthy level as a result of Ford's increased contributions.

Under the terms of the SUB Plan, an employee trades credit units for SUB benefits. An employee is allotted credit units based on seniority and number of hours worked. While the Delks were prohibited from or restricted in trading credit units for benefits during that five month period from July to December, thereafter they were able to use their credit units to receive benefits.

II.

The First Issue raised by the Delk Plaintiffs is whether the district court applied the proper standard of care applicable to the fiduciary-employer of an ERISA-governed plan designed to provide benefits to workers laid off by the employer. The Delk Plaintiffs argue that the district court applied the arbitrary and capricious standard but should have applied the prudent person standard; the defendants argue that the district court did apply the prudent person standard.

The question whether the trial court applied the proper standard of review is an issue of law subject to *de novo* review. *See Complaint of Paducah Towing Co., Inc.*, 692 F.2d 412, 422 (6th Cir. 1982).

After reviewing the extensive findings of fact and conclusions of law made by the trial court, this court finds that the district court did apply the proper standard of review. The court noted – and the parties do not dispute – (1) that the plaintiffs' claims under the Labor

Management Relations Act were subject to the arbitrary and capricious standard, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), *Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444 (6th Cir. 1992); (2) that, under ERISA, where the plan grants discretion in specific terms, the denial of benefits or interpretation of the plan by the trustee or administrator is to be overturned only if it is arbitrary and capricious, *Cairns v. Bridgestone/Firestone, Inc.*, 802 F. Supp. 152 (N.D. Ohio 1992); (3) that claims of wrongful denial of benefits are reviewed under a *de novo* standard unless the plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); and (4) that, in general, the fiduciary's conduct is measured by the objective, prudent person standard, 29 U.S.C. § 1104(a)(1)(B).

In accordance with the multiple levels of review prescribed by ERISA and the cases interpreting it, the district court applied different standards in analyzing different decisions. For example, the court applied the arbitrary and capricious standard to Ford's determination of employees' eligibility to collect SUB benefits, the amount of benefit to which each employee was entitled, the number of credits an employee must surrender to receive a SUB benefit, and whether an overpayment occurred. Findings of Fact and Conclusions of Law, para. 12. It is equally clear that the court applied the prudence standard to the plaintiffs' claims that Ford and the UAW failed to adequately preserve the assets of the SUB Fund. *See* Findings of Fact and Conclusions of Law, para's 22-26,

The court stated in this section of its Findings of Fact and Conclusions of Law:

> The Court must evaluate the 'prudence of the fiduciaries under the circumstances prevailing when they make their decision and in light of the alternatives available to them.' *Marshall v. Glass/Metal Ass'n and Glaziers & Glassworkers Pension Plan*, 507 F. Supp. 378, 384 (D. Hawaii 1980).

Findings of Fact and Conclusions of Law, para. 26. The court added, "A fiduciary's conduct is to be judged according to the standards of others acting in a like capacity and familiar with such matters. *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir.), *cert. denied*, 469 U.S. 1072, 105 S. Ct. 565 (1984)." Findings of Fact and Conclusions of Law, para. 28. This is the objective, prudent person standard which the plaintiffs advocate. After examining all of the plaintiffs' claims, each under its appropriate standard of review, the court concluded: "This Court concludes as a matter of law that Ford's actions were not arbitrary or capricious and that given the information available to Ford during the period in question, Ford acted reasonably and prudently even under a *de novo* standard of review." Findings of Fact and Conclusions of Law, para. 34. The court properly judged each alleged impropriety under the appropriate standard.

III.

The Delk Plaintiffs' second issue is whether they have standing to recover benefits directly to them, as opposed to the Plan. The trial court bifurcated the liability and damages issues for trial. Because the trial court

found no liability – and this court affirms that determination – there is no need to determine whether the individuals have standing to recover benefits directly to them; no benefits are recoverable by either the plaintiffs or the SUB Plan.

IV.

The Arthur Plaintiffs ask this court to find that Ford breached the SUB Plan by failing timely to notify them of overpayments of SUB benefits before it acted to recoup those overpayments.

The SUB Plan permits Ford to recoup overpayments, unless, *inter alia*, "notice has not been given within 120 days from the date the overpayment was established or created, . . . " This is the phrase the court must interpret. There is no dispute that the Arthur class members received overpayments and received notices of overpayment of SUB benefits on or about September 9, 1980. The question is when the 120-day period began to run.

Members of the Arthur class argue that the 120-day period began to run on April 17, 1980, when the Secretary of Labor determined and certified the plant at which they worked as sufficiently affected by foreign trade so as to make the workers eligible for TRA benefits. Ford contends that the relevant date is August 4, 1980, the date determined by the Joint Board of Administration pursuant to the Ryder-Bannon Agreement. The trial court did not pinpoint the date on which the overpayments were established or created but rather concluded that, under any reasonable interpretation, they were not established or created more than 120 days before September 9, 1980.

We conclude that the district court was correct in finding that the notice of overpayment was timely and in rejecting the Arthur Plaintiffs' contention that the trigger date should be April 17, 1980. First, on April 17, 1980, no member of the Arthur class had actually received SUB benefits; the first payment was received on May 14, 1980 by Arthur Plaintiff Patricia Wright. Second, while the April 17, 1980 certification by the Department of Labor established that some employees would probably receive TRA benefits, it did not establish which ones would receive them or in what amount. The states themselves had not yet made those determinations in April 1980, and Ford could not have been expected to know the amounts of over payments at that time. It is simply not sensible to construe the phrase "established or created" as April 17, 1980 – before any Arthur Plaintiff actually received any TRA benefits and before even the state had determined which employees would receive TRA benefits and in what amounts. Furthermore, if the SUB Plan had begun recoupment in April, employees would have had a lapse in benefits. By waiting, the SUB Plan ensured that workers were receiving benefits.

The earliest the overpayments could possibly have been established or created was May 14, 1980, when the first Arthur Plaintiff received the first TRA check. It is equally sensible to place the trigger date at August 4, 1980, the date on which the Plan, as modified by the Ryder-Bannon Agreement, permitted Ford to begin off-setting TRA benefits against SUB benefits. The district court's finding is correct.

The findings of fact and conclusions of law of the district court are affirmed in all respects.

APPENDIX B

ARTICLE VII

FINANCIAL PROVISIONS AND REPORTS

Section 1. Establishment of Fund

The Company shall establish, in accordance with the Plan, a Fund with a qualified bank or banks or a qualified trust company or companies selected by the Company as Trustee. The Company's contributions shall be made into the Fund, the assets of which shall be held, invested and applied by the Trustee, all in accordance with the Plan. Automatic Short Week Benefits shall be payable by the Company. All other Benefits and Separation Payments shall be payable only from the Fund. The company shall provide in the trust agreement that the assets of the Fund shall be held in cash or invested only in:

(i) general obligations of the United States Government and obligations of any agency or instrumentality of the United States Government or of any United States Government sponsored private corporation, or obligations of any other organization which are backed by the full faith and credit of, or are contractual obligations of the United States; and/or

(ii) prime quality short-term obligations such as commercial paper, bankers acceptances, certificates of deposit, or similar investments, and/or

(iii) a common, collective or commingled investment fund consisting of any combination of the investments under (i) and (ii) above;

irrespective of the rate of return, or the absence of any return, thereon, and without any absolute or relative limit

upon the amount that may be invested in any one or more types of investment. The Trustee shall not be liable for the making or retaining of any such investment or for realized or unrealized loss thereon whether for normal or abnormal economic conditions or otherwise.

Section 2. Maximum Funding

(a) Maximum Funding of the Fund shall be determined for each calendar month (and for each Pay Period when required by the provisions of Section 3(b) of this Article) by multiplying the Average Full Benefit Rate by 12 and this result by the sum of

(1) the average number of Covered Employes on the Active Employment Rolls receiving pay, and

(2) the average number of persons laid off from work as Covered Employes who are not included in (1) but who have Credit Units;

both numbers being determined by the Company on the basis of the average number of Employes during 52 consecutive weeks ending with the 3rd Sunday preceding the first Monday in the month for which the Maximum Funding is being determined.

(b) (1) The Average Full Benefit Rate for the purpose of determining Maximum Funding shall be computed monthly and shall be the amount determined by dividing (i) the total dollar amount of all Full Benefits paid during the 12 months immediately prior to the month next preceding the month for which Maximum Funding is being determined, by (ii) the number of such Full Benefits paid.

(2) A Full Benefit shall mean (i) a Regular Benefit which has not been reduced because of Other

Compensation as defined in Section 3(a) of Article II and (ii) a Leveling Week Benefit.

Section 3. CUCB (Credit Unit Cancellation Base)

(a) A CUCB shall be determined for each calendar month in the following manner: The current market value of the total assets in the Fund as of the close of business on the last day of the immediately preceding month as certified by the Trustee (plus, as provided in Section 5(c) of this Article, additional contribution amounts, if any, to be added to the market value of the assets for Automatic Short Week Benefits for Scheduled Short Workweeks paid during the previous month) shall be divided by the number of persons used in determining Maximum Funding for such month.

(b) The CUCB for any particular month shall be applied to each of the Pay Periods beginning within such month; provided, however, that whenever the CUCB for any particular month beginning prior to January 1, 1980 is less than $180.00, beginning on or after January 1, 1980 but before January 1, 1982 is less than $198.00 or beginning on or after January 1, 1982 is less than $211.00, the CUCB shall be applied only to the first Pay Period beginning within such month, and thereafter there shall be determined a CUCB for each Pay Period until the CUCB for a particular Pay Period equals or exceeds the CUCB stated for such period. When the CUCB for a particular Pay Period equals or exceeds the CUCB stated for such period, such CUCB shall be applied to each Pay Period until a CUCB for the following calendar month shall be applicable. The CUCB for a particular Pay Period shall be determined on the basis of the current market value of the total assets in the Fund as of the close of business on the Friday preceding such Pay

Period as certified by the Trustee (plus, as provided in Section 5(c) of this Article, additional contribution amounts, if any, to be added to the market value of the assets for Automatic Short Week Benefits for Scheduled Short Workweeks paid during the previous month).

Section 4. Finality of Determinations

No adjustment in the Maximum Funding or the CUCB shall be made on account of any subsequently discovered error in the computations or the figures used in making the computations, unless such adjustment is practicable. Any adjustment made shall only be prospective in effect, unless such adjustment would be substantial in the opinion of the Company. Nothing in the foregoing shall be construed to excuse the Company from making up any shortage in its contributions to the Fund.

Section 5. Company Contributions

With respect to each of the Pay Periods which begins within a month for which the current market value of the assets of the Fund (determined as of the close of business on the last day of the immediately preceding month) is less than the Maximum Funding, the Company shall make a contribution to the Fund equal to the lesser of the following amounts:

(a) The amount required to increase the value of the assets of the Fund (determined as of the date set forth above) to, but not in excess of, 100% of the Maximum Funding of the Fund; or

(b) (1) An amount determined by multiplying (i) the number of straight time hours, time and one-

half hours, and double time hours, respectively, for which Employes shall have received pay from the Company (excluding any hours for which Benefits hereunder are payable to Employees) for such Pay Period, by (ii) the applicable number of cents-per-hour, depending upon the percentage relationship of the value of the assets of the Fund to the Maximum Funding of the Fund, as determined in accordance with Table A below for each such Pay Period that begins after January 1, 1979, but on or before January 1, 1982 and in accordance with Table B below for each such Pay Period that begins on or after January 1, 1982;

TABLE A

Percentage relationship of Fund assets to Maximum Funding		Applicable number of cents per straight time hour	Applicable number of cents per time and one-half hour	Applicable number of cents per double-time hour
At Least	But less Than			
77.5%	100.0%	14¢	20¢	26¢
70.0%	77.5%	15¢	21¢	27¢
62.5%	70.0%	16¢	22¢	28¢
55.0%	62.5%	17¢	23¢	29¢
47.5%	55.0%	18¢	24¢	30¢
40.0%	47.5%	19¢	25¢	31¢
32.5%	40.0%	20¢	26¢	32¢
25.0%	32.5%	21¢	27¢	33¢
17.5%	25.0%	22¢	28¢	34¢
10.0%	17.5%	23¢	29¢	35¢
Less than	10%	24¢	30¢	36¢

TABLE B

Percentage relationship of Fund assets to Maximum Funding		Applicable number of cents per straight time hour	Applicable number of cents per time and one-half hour	Applicable number of cents per double-time hour
At Least	But less Than			
85.0%	100.0%	14¢	20¢	26¢
77.5%	85.0%	15¢	21¢	27¢
70.0%	77.5%	16¢	22¢	28¢
62.5%	70.0%	17¢	23¢	29¢
55.0%	62.5%	18¢	24¢	30¢
47.5%	55.0%	19¢	25¢	31¢
40.0%	47.5%	20¢	26¢	32¢
32.5%	40.0%	21¢	27¢	33¢
25.0%	32.5%	22¢	28¢	34¢
17.5%	25.0%	23¢	29¢	35¢
10.0%	17.5%	24¢	30¢	36¢
2.5%	10.0%	25¢	31¢	37¢
Less than	2.5%	26¢	32¢	38¢

(2) If, for any such Pay Period, the total number of hours for which Employes shall have received pay from the Company when multiplied by the applicable number of cents-per-hour is more than the number of hours required to increase the value of the assets of the Fund to the next higher percentage of Maximum Funding, only the number of hours required to reach the next such higher percentage shall be multiplied by the applicable cents-per-hour set forth in the appropriate table. The remaining hours (the difference between the total number of hours and the lesser number of hours required to reach the next higher percentage) shall be multiplied by

the applicable lesser cents-per-hour set forth in the appropriate table for the next higher percentage.

(c) Short Workweek Contributions

(1) After calendar year 1979 and after each subsequent calendar year, if the market value of the assets of the Fund as of the close of business on the last day of December, 1979 and the last day of each December thereafter is less than 100% of Maximum Funding, the Company shall make a contribution to the Fund, if required by the following computation, in an amount equal to the amount, if any, by which (a) the total dollar amount of Automatic Short Week Benefits paid for layoffs that occurred during Pay Periods beginning in the preceding calendar year (excluding any such Benefit paid for a layoff resulting exclusively from an act of God, as defined below, or part of such Benefit attributable to the period during which the act of God continues to necessitate the layoff) exceeds (b) the amount determined by multiplying four cents ($.04) for calendar years 1978 and 1979, and five cents ($.05) for calendar year 1980 and thereafter by the total number of hours for which Employes received pay from the Company for Pay Periods beginning in such calendar year minus (c) the total of any contributions made for months within such calendar year pursuant to Subsection (2) of this Section 5(c), but not in excess of the amount necessary to increase the market value of the assets of the Fund to 100% of Maximum Funding. The term "act of God" as used in this Subsection means an occurrence or circumstance directly affecting a Company Plant or Plants which results from natural causes exclusively and is in no sense attributable to

human negligence, influence, intervention or control; the result solely of natural causes and not of human acts.

(2) If the CUCB for the month is less than $625, the Company shall make, in addition to any contribution under Subsection (a) or (b) of this Section, a contribution equal to the lesser of:

(i) the amount of any Automatic Short Week Benefits paid for Scheduled Short Workweeks commencing during the preceding month which were offset against Company contributions in accordance with Subsection (d) of this Section; or

(ii) the amount necessary to bring the CUCB up to $625 for the month with respect to which such contribution is made.

The amount of any contribution under this Subsection shall be added to the market value of the assets of the Fund for purposes of determining the CUCB to be used for all purposes under the Plan for the month with respect to which any such contribution is made.

(d) Additional Company Contributions

If after any required contributions are made under Subsection (a) or (b) and under Subsection (c) of this Section for any Pay Period, the Fund does not have sufficient assets to pay Regular Benefits otherwise due and payable under the Plan, and if there are applications due and payable for Regular Benefits as follows:

(1) Weeks beginning prior to January 1, 1980, during which the CUCB exceeded $32.99;

(2) Weeks beginning on or after January 1, 1980 and before January 1, 1982, during which the CUCB exceeded $36.49; or

(3) Weeks beginning on or after January 1, 1982 during which the CUCB exceeded $38.49;

the Company shall make an additional contribution to the Fund equal to the amount of such Regular Benefits.

(e) Contributions Based on Guaranteed Benefit Account

If after any required contributions are made under Subsection (a) or (b) and under Subsections (c), and (d) of this Section for any Pay Period beginning on or after October 1, 1979, the Fund does not have assets to pay Regular Benefits otherwise due and payable under the Plan to Employes with ten (10) or more years of Seniority, the Company shall make an additional contribution to the Fund equal to the lesser of:

(1) an amount sufficient to pay such Regular Benefits; or

(2) an amount equal to (A) $400 multiplied by the average number of covered employes and other persons used in determining Maximum Funding for the month of September, 1979 under Article VII, Section 2(a) of the 1976 Supplemental Unemployment Benefit Plan, less (B) the sum of contributions previously made under this Subsection (e).

(f) Reduction in Contributions

(1) The Company's contributions to the Fund, as determined under Subsections (a), or (b) and (c) of this Section, shall be reduced by:

(i) the amounts of Automatic Short Week Benefits paid by the Company (other than Benefits

paid for Scheduled Short Workweeks in Pay Periods with respect to which the CUCB is less than $625);

(ii) all amounts paid by the Company to provide Moving Allowances under Article IX, Section 28(b) of the Collective Bargaining Agreement;

(iii) the amounts of any Benefits and lump sum payments paid by the Company to separated Employes under other agreements, dated October 4, 1979, between the Company and the Union which specifically provide that the amount of such Benefits and lump sum payments as are paid thereunder shall be deducted from contributions required under the Plan.

(iv) the amount of any Company contributions under Subsection (d) above; and

(v) One-half of the amount of any Company contributions paid under Subsection 5(e) above that are in excess of an amount equal to the product of $200 multiplied by the average number of Employes used in determining Maximum Funding for the month of September, 1979 (such total excess amount hereinafter referred to as the "recoverable amount"). If the percentage relationship of the value of the assets of the Fund to Maximum Funding is seventy percent (70%) or more, an amount equal to five cents-per-hour times the total number of hours for which Employes shall have received pay from the Company (excluding any hours for which Benefits hereunder are payable) for such Pay Period but not more than an amount equal to the remaining one-half of the "recoverable amount." The accumulative total amount of all reductions under

this Subsection 5(f)(1)(v) shall not exceed the total "recoverable amount" of Company contributions paid under Subsection 5(e) above.

(2) If contributions to the Fund are not required for any period, or if the contributions required are less than the amounts to be offset under Paragraph (1) above, then any subsequently required contributions shall be reduced by the amount not previously offset against contributions. Any such amount determined under Subparagraphs (i), (ii), (iii) and (iv) not previously offset against contributions shall be deducted from the market value of the assets in the Fund in determining the CUCB and the relationship of the assets of the Fund to Maximum Funding. Also, any such amount determined under Subsection 5(f)(1)(v) above relating to the immediately recoverable one-half of the "recoverable amount" of contributions that has not previously been offset against contributions, shall be deducted from the market value of the assets in the Fund in determining the CUCB and the relationship of the asset of the Fund to Maximum Funding.

(g) Definition of Scheduled and Unscheduled Short Workweek

(1) For purposes of the Plan, a Scheduled Short Workweek with respect to an Employe is a Short Workweek which management schedules in order to reduce the production of the Plant, department or other unit in which the Employe works to a level below the level at which the production of such Plant, department or unit would be for the Week were it not a Short Workweek, but only where such reduction of production is for the purpose of adjusting production to customer demand.

(2) For purposes of the Plan, an Unscheduled Short workweek with respect to an Employe is any Short Workweek:

(i) which is not a scheduled Short Workweek as defined in Paragraph (1) of this Subsection;

(ii) in which an Employe returns to work from layoff to replace a separated or absent Employe (including an Employe failing to respond or tardy in responding to recall), or returns to work, after a full Week of layoff, in connection with an increase in production, but only to the extent that the Short Workweek is attributable to such cause; or

(iii) in which an Employe last works at the beginning of, or in which he first works at the end of, a model change period as defined under Article VIII, Section 21(a) of the Collective Bargaining Agreement.

(3) For any Short Workweek which includes both Scheduled and Unscheduled Short Workweek circumstances with respect to an Employe:

(i) the number of hours by which 40 exceeds his Compensated or Available Hours shall be deemed to be hours for which a Benefit for a Scheduled Short Workweek is paid to the extent that such hours do not exceed the hours not worked for reasons set forth in Paragraph (1) of this Subsection, and

(ii) any remaining hours shall be deemed to be hours for which a Benefit is paid for an Unscheduled Short Workweek.

(4) The Company will give written notice to the Union members of the Local Committee and to the Union at the time of layoff of the reason or reasons for any

Short Workweek with respect to which the CUCB is less than $625.

In addition, with respect to any Short Workweek layoff that results from an act of God, the Company will give written notice to the Union members of the Local Committee and to the Union no later than the end of the Week following the Short Workweek showing the reason or reasons for such Short Workweek, and an explanation of the incident which caused the Company to determine that the layoff was the result of an act of God, as defined in Section 5(c)(1) of this Article.

(h) When Contributions Are Payable

(1) Each contribution by the Company shall be made on or before the close of business on the first regularly scheduled workday in the second calendar week following the pay day for the Pay Period with respect to which the contribution is being made.

(2) Contributions with respect to Covered Employes at any additional Plant at which the Collective Bargaining Agreement becomes applicable shall commence with respect to the first Pay Period beginning after

(i) the date of certification by the National Labor Relations Board of the Union as the collective bargaining representative of Employes at such Plan, or,

(ii) if recognition is by agreement, the effective date of the agreement by which the Company recognizes the Union as the collective bargaining representative of Employes at such Plant.

(i) Effect of Withholding

If the Company at any time shall be required to withhold any amount from any contribution to the Fund by reason

of any federal, state or municipal law or regulation, the Company shall have the right to deduct such amount from such contribution and to pay only the balance to the Fund.

(j) No Contribution Obligation

Notwithstanding any other provisions of the Plan, the Company shall not be obligated to make any contribution to the Fund with respect to any Pay Period which begins within a month for which the current market value of the assets in the Fund (determined as of the close of business on the last day of the immediately preceding month) is equal to or in excess of the Maximum Funding, and no contribution to the Fund for any Pay Period shall be in excess of the amount necessary to bring the total market value of the assets in the Fund up to the Maximum Funding.

Section 6. Liability

(a) The provisions of these Articles I through XI, together with the provisions of any Alternate Benefit plans established and maintained pursuant to the Plan, constitute the entire Plan. The provisions of this Article VII express, and shall be deemed to express, completely each and every obligation of the Company with respect to the financing of the Plan and providing for Benefits and Separation Payments. The Company shall not be obligated to make up, or to provide for making up, any depreciation, or loss arising from depreciation, in the value of the securities held in the Fund (other than as contributions by the Company may be required under the provisions of this Article, when the market value of the assets of the Fund is less than the Maximum Funding); and

the Union shall not call upon the Company to make up, or to provide for making up, any such depreciation or loss.

(b) The Board, the Company, the Trustee, and the Union, and each of them, shall not be liable because of any act or failure to act on the part of any of the others, and each is authorized to rely upon the correctness of any information furnished to it by an authorized representative of any of the others.

(c) Notwithstanding the above provisions, nothing in this Section shall be deemed to relieve any person from liability for willful misconduct or fraud or from responsibility or liability for any obligation or duty under ERISA.

Section 7. No Vested Interest

No person shall have any right, title or interest in or to any of the assets of the Fund or in or to any Company contribution thereto.

Section 8. Company Reports

(a) Market Value of Fund Assets

Not later than the third Tuesday following the first Monday of each month, the Company shall furnish a statement to the Union, based on reports from the Trustee, showing a reconciliation of the Fund activity during the preceding month. The total market value of the Fund will be determined as of the close of business on the last day of each month. The reconciliation for the monthly period reported will show the amount of Company contributions received by the Fund by date, the total amount of Benefits and Separation Payments paid from the Fund, the

amount of any expenses charged to the Fund and the amount of gain or loss in the Fund assets.

(b) Company Payments Not Recovered from Company Contributions

Not later than the third Tuesday following the first Monday of each month, the Company shall furnish a statement to the Union showing, with respect to the preceding month's activity, a reconciliation of the amount, if any, of payments paid by the Company which could not be offset against Company contributions to the Fund and which were deducted from the market value of the assets in the Fund in determining the relationship of the assets of the Fund to Maximum Funding. Such reconciliation will show the total amount of any such additional Company payments paid and the total amount of such Company payment deducted from Company contributions, during the period covered by the report.

(c) Maximum Funding and CUCB

Not later than the third Tuesday following the first Monday of each month the Company shall notify the Board and the Union of the amount of the Maximum Funding and the CUCB as determined by it from time to time under the Plan and shall furnish a statement showing the Average Full Benefit Rate (showing a breakdown of the included number and amount of Full Benefits paid) and the numbers of Employes in each category in each month and the average number used in determining Maximum Funding.

(d) Contributions and Direct Company Payments

Not later than the third Tuesday following the first Monday of each month the Company shall furnish a statement to the Union showing for the preceding month:

(1) The number of hours for which Employes shall have received pay from the Company and the number of such hours with respect to which the Company shall not have made contributions to the Fund as provided in Section 5(j) of this Article during each period for which contributions were made to the Fund or would have been made to the Fund, except for the provision of Section 5(j) of this Article.

(2) The number of hours and the amount of the Company contributions at each applicable number of cents per hour with respect to which the Company shall have made contributions to the Fund and the amount of any Scheduled Short Workweek contributions by the Company.

(3) The amount of Automatic Short Week Benefits by which the amount determined in (2) above was reduced.

(4) The number of lump-sum payments paid by the Company in the State of Georgia in accordance with the Letter Agreement dated October 4, 1979, between the Company and the Union, and the amount of such lump-sum payments by which the amount determined in (2) above was reduced.

(5) The number of Benefits and of lump-sum payments paid by the Company to certain Employes who are retired in accordance with the Letter Agreement dated October 4, 1979, between the Company and the Union, and the respective amount of such Benefits and lump-sum payments by which the amount determined in (2) above was reduced.

(6) The amount of contributions the Company shall have made to the Fund in accordance with Section 5(d) of this Article VII.

(7) The amount of contributions the Company shall have made to the Fund in accordance with Section 5(e) of this Article VII, including the amount of any recovery of such contributions made by the Company, pursuant to Subsection 5(f)(1)(v) of this Article VII.

(8) The total amount of the Company contribution which was made to the Fund.

(e) Benefits and Separation Payments Paid from Fund

Not later than the third Tuesday following the first Monday of each month, the Company shall furnish a statement to the Union showing the number and amount of payments, if any, made from the Fund during each Week of the preceding month, as:

(1) Leveling Week Benefits.

(2) Regular Benefits paid to Employes who were eligible for a State System Benefit shown separately as Regular Benefits paid with and without reduction for Other Compensation.

(3) Regular Benefits paid without reduction for Other Compensation to Employes who were not eligible for a State System Benefit for one or more of the reasons set forth in Section 1(b) of Article I, shown separately for reasons thereunder as follows and not included in any of the foregoing:

(i) Section 1(b)(ii) and (vi) when maximum Benefit amount applies

(ii) all other items under Article I, Section 1(b).

(4) Regular Benefits paid with reduction for Other Compensation to Employes who were not eligible for a State System Benefit for one or more of the reasons set forth in Section 1(b) of Article I, shown separately for reasons thereunder as follows and not included in any of the foregoing:

(i) Section 1(b)(ii) and (vi) when maximum Benefit amounts applies

(ii) all other items Article I, Section 1(b).

(5) Regular Benefits paid to Employes who were eligible with respect to some but not all of the regular work days in a Week, as provided in Section 3(d) of Article I, and not included in any of the foregoing, shown separately as Regular Benefits paid with and without reduction for Other Compensation.

(6) Separation Payments.

(f) Automatic Short Week Benefits Paid by Company

Not later than the third Tuesday following the first Monday of each month, the Company shall furnish to the Union a statement showing the number and amount of Automatic Short Week Benefits, if any, paid by the Company during each Week of the preceding month; and with respect to any Week for which the amount of Scheduled Automatic Short Week Benefits is not deductible from Company contributions because of the Fund position, the number and amount of Scheduled and Unscheduled Benefits paid, respectively.

(g) The Company shall furnish the Board and the Union quarterly a listing by Plant showing the names of the persons who, during the preceding calendar quarter, accepted a Separation Payment, together with both

the individual gross and net amounts of such Separation Payments.

(h) On or before April 30 of each year, the Company shall furnish to the Union a statement, certified by a qualified independent firm of certified public accountants selected by the Company, verifying the accuracy of the information furnished by the Company during the preceding year pursuant to Subsections (a), (b), (c), (d), (e) and (f) of this Section.

(i) The Company or the Trustee shall furnish annually to each Employe who received Benefits or a Separation Payment, or both, during the year a statement showing the total amount received and any amount of tax withheld therefrom.

(j) On or before April 30 of each year, the Company shall furnish to the Union a statement showing the number of Employes receiving Regular Benefits during the preceding year, distributed according to the number of such Benefits received.

(k) On or before April 30 of each year, the Company shall furnish to the Union a statement showing the average State System Benefit received by Employes for weeks with respect to which they received Regular Benefits paid without reduction for Other Compensation as defined in Section 3(a) of Article II during the preceding year.

(l) On or before April 30 of each year, the Company shall furnish to the Union a statement showing the amount of any contribution made to the Fund in accordance with Section 5(c)(1) of this Article for Automatic Short Week Benefit payments.

(m) On or before January 31 of each year, the Company shall furnish to the Union a statement showing the number of Employes to whom Guaranteed Annual Income Credit Units were credited on the preceding

Guarantee Date and the number of such Guaranteed Annual Income Credit Units both distributed according to the Seniority brackets set forth in the table in Section 1(a) of Article III-A and according to the number of Credit Units which were credited (numbers above 13 being grouped in intervals of 5).

(n) After December 31 of each year, the Company shall furnish to each Employe credited with Credit Units as of each such date a statement showing the number of such Credit Units.

(o) The Company will comply with reasonable requests by the Union for other statistical information on the operation of the Plan which the Company may have compiled.

Section 9. Costs of Administering the Plan

(a) Expenses of Trustee

The costs and expenses incurred by the Trustee under the Plan, and the fees charged by the Trustee, shall be charged to the Fund.

(b) Expenses of the Board of Administration

The compensation of the Chairman of the Board, which shall be in such amount and on such basis as may be determined by the other members of the Board, shall be shared equally by the Company and the Union. The Company members and the Union members of the Board and of Local Committees shall serve without compensation from the Fund. Reasonable and necessary expenses of the Board for forms and stationery required in connection with the handling of appeals shall be borne by the Company.

(c) Cost of Services

The Company shall be reimbursed each year from the Fund for the cost to the Company of bank fees and auditing fees for services performed in connection with the Plan and the Fund.

Section 10. Benefit and Separation Payment Drafts Not Presented

If the Trustee has segregated any portion of the Fund in connection with any determination that a Benefit or Separation Payment is payable under the Plan and the amount of such Benefit or Separation Payment is not claimed within a period of 2 years from the date of such determination, such amount shall revert to the Fund.

APPENDIX C

§ 2273. Determinations by Secretary of Labor

Certification of eligibility

(a) As soon as possible after the date on which a petition is filed under section 2271 of this title, but in any event not later than 60 days after that date, the Secretary shall determine whether the petitioning group meets the requirements of section 2272 of this title and shall issue a certification of eligibility to apply for assistance under this part covering workers in any group which meets such requirements. Each certification shall specify the date on which the total or partial separation began or threatened to begin.

§ 2291. Trade readjustment allowances; qualifying requirements for workers

Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification under subpart A of this part who files an application for such allowance for any week of unemployment which begins after the date specified in such certification pursuant to section 2273(a) of this title, if the following conditions are met:

(1) Such worker's last total or partial separation before his application under this part, occurred –

(A) on or after the date, as specified in the certification under which he is covered, on which total or partial separation began or threatened to begin in the adversely affected employment, and

(B) before the expiration of the 2-year period beginning on the date on which the determination under section 2273 of this title was made, and

(C) before the termination date (if any) determined pursuant to section 2273(d) of this title; and

(2) Such worker had, in the 52 weeks immediately preceding such total or partial separation, at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm, or, if data with respect to weeks of employment are not available, equivalent amounts of employment computed under regulations prescribed by the Secretary.

APPENDIX D

§ 2271. Petitions

(a) Filing of petition; publication of notice

A petition for a certification of eligibility to apply for adjustment assistance under this subpart may be filed with the Secretary of Labor (hereinafter in this part referred to as the "Secretary") by a group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) or by their certified or recognized union or other duly authorized representative. Upon receipt of the petition, the Secretary shall promptly publish notice in the Federal Register that he has received the petition and initiated an investigation.

(b) Hearing

If the petitioner, or any other person found by the Secretary to have a substantial interest in the proceedings, submits not later than 10 days after the date of the Secretary's publication under subsection (a) of this section a request for a hearing, the Secretary shall provide for a public hearing and afford such interested persons an opportunity to be present, to produce evidence, and to be heard.

§ 2291. Qualifying requirements for workers

(a) Trade readjustment allowance conditions

Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification under subpart A of this part who files an application for such allowance for any week of unemployment which

begins more than 60 days after the date on which the petition that resulted in such certification was filed under section 2271 of this title, if the following conditions are met:

(1) Such worker's total or partial separation before his application under this part occurred –

(A) on or after the date, as specified in the certification under which he is covered, on which total or partial separation began or threatened to begin in the adversely affected employment,

(B) before the expiration of the 2-year period beginning on the date on which the determination under section 2273 of this title was made, and

(C) before the termination date (if any) determined pursuant to section 2273(d) of this title.

(2) Such worker had, in the 52-week period ending with the week in which such total or partial separation occurred, at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm, or, if data with respect to weeks of employment with a firm are not available, equivalent amounts of employment computed under regulations prescribed by the Secretary. For the purposes of this paragraph, any week in which such worker –

(A) is on employer-authorized leave for purposes of vacation, sickness, injury, maternity, or inactive duty or active duty military service for training,

(B) does not work because of a disability that is compensable under a workmen's compensation law or plan of a State or the United States,

(C) had his employment interrupted in order to serve as a full-time representative of a labor organization in such firm or subdivision, or

(D) is on call-up for purposes of active duty in a reserve status in the Armed Forces of the United States, provided such active duty is "Federal service" as defined in section 8521(a)(1) of Title 5, and

shall be treated as a week of employment at wages of $30 or more, but not more than 7 weeks, in case of weeks described in subparagraph (A) or (C), or both (and not more than 26 weeks, in the case of weeks described in subparagraph (B) or (D), may be treated as weeks of employment under this sentence.

(3) Such worker –

(A) was entitled to (or would be entitled to if he applied therefor) unemployment insurance for a week within the benefit period (i) in which such total or partial separation took place, or (ii) which began (or would have begun) by reason of the filing of a claim for unemployment insurance by such worker after such total or partial separation;

(B) has exhausted all rights to any unemployment insurance to which he was entitled (or would be entitled if he applied therefor); and

(C) does not have an unexpired waiting period applicable to him for any such unemployment insurance.

(4) Such worker, with respect to such week of unemployment, would not be disqualified for extended compensation payable under the Federal-State Extended Unemployment Compensation Act of 1970 by reason of the work acceptance and job search requirements in section 202(a)(3) of such Act.

(5) Such worker –

(A) is enrolled in a training program approved by the Secretary under section 2296(a) of this title,

(B) has, after the date on which the worker became totally separated, or partially separated, from the adversely affected employment, completed a training program approved by the Secretary under section 2296(a) of this title, or

(C) has received a written statement certified under subsection (c)(1) of this section after the date described in subparagraph (B).